Bethea Baptist Home, a Division of South Carolina Baptist Ministries for the Aging, Inc. ***and*** **United Food and Commercial Workers Union Local 204, AFL–CIO.** Cases 11–CA–13484, 11–CA–13576, 11–CA–13697, 11–CA–13918, 11–CA–14056, 11–CA–14182, and 11–CA–14427

January 22, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 1, 1992, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions, and the Respondent filed a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by negotiating in bad faith with the Union. The Respondent denies that it bargained in bad faith, contending that it was entitled to insist on its various proposals and accusing the Union of frustrating negotiations. We agree with the judge and find that the Respondent engaged in a bad-faith attempt to avoid reaching agreement with the Union.

In determining whether an employer has engaged in surface or bad-faith bargaining, we examine the totality of the employer's conduct, both away from and at the bargaining table, for evidence of its real desire to reach agreement. *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *United Technologies Corp.*, 296 NLRB 571, 572 (1989). We find that the Respondent's overall conduct—i.e., the positions taken by the Respondent throughout bargaining, the manner in which the Respondent advanced those positions, and the Respondent's commission of other unfair labor practices—evinces the Respondent's desire to avoid its statutory obligation to bargain in good faith with the Union.

At the outset of negotiations, the Respondent was evasive in its representations to the Union about its employment policies, and left the Union in the dark as to the Respondent's existing policies and practices, knowledge of which was necessary for meaningful bargaining by the Union. For example, at the first bargaining session, the Respondent's negotiators presented, on the Union's request, a packet of materials setting forth its various policies, but admitted that some policies were not contained in the written documents and some had not been communicated to employees. The Respondent's chief negotiator, Julian Gignilliat, stated, ''[W]e gave you our policies, but we didn't say we followed them.'' The Respondent also provided requested job descriptions, but Gignilliat said that the descriptions were not necessarily accurate as to the Respondent's current practices and ''may or may not be about real jobs.'' When asked how employees were supposed to know what their assignments were, in the absence of job classifications, Gignilliat responded, ''[T]hey get it by osmosis.''

The Respondent was unwilling to put into writing several proposals to which it had agreed or was amenable. For example, the Respondent's negotiators stated that they would advise their client to grant the Union's request to allow employees to examine their own personnel files, but refused to include the provision in the collective-bargaining agreement. Additionally, the Respondent agreed to provide certain areas in the facility to be used for union business on break periods, but refused to put the agreement in writing. Further, the Respondent indicated that it was agreeable to providing breaktimes for employees at its discretion but then stated that ''they didn't want to have anything [in the contract] that said the employees were entitled to anything.'' Finally, the Respondent was amenable to providing employee orientation, but Gignilliat refused to put the agreement in writing because he viewed the ''contract as a promise to do certain things'' and he ''didn't want to promise to do it in the contract.''

The Respondent further impeded the bargaining process by pretending to make meaningful concessions to the Union while preserving its proposals in other parts of the contract. For example, the Respondent insisted on an employment-at-will provision,[2] which the Union found particularly objectionable. The Respondent purportedly agreed to consider dropping the provision only in response to the Union's offer to eliminate arbitration from its proposals. However, the Respondent continued to insist on both omitting arbitration and including a management-rights clause that contained the right to terminate an employee without just cause for actions during work and nonwork hours. Thus, the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent's employment-at-will proposal states:

> Notwithstanding any other provision with this Agreement, all employees are employed at will. This means that an employee has the right to terminate his employment at any time, with or without notice and with or without reason, and that the employer has the same right.

Respondent in effect preserved its employment-at-will provision while pretending to make a concession to the Union.[3]

Further, we find significant the Respondent's declaration of impasse at a time when the parties clearly were not at impasse and its commission of numerous unfair labor practices away from the bargaining table, including threatening employees with loss of benefits if they selected the Union and instituting unilateral changes fulfilling its threat. We note further that the Respondent admittedly implemented the changes in part in order to pressure the Union to make further concessions and thereby improve its bargaining position. We believe that the Respondent's conduct manifests a mindset at odds with reaching an agreement with the Union.

Finally, we note that the Respondent insisted on proposals which would leave the Union with fewer rights than imposed by law without a contract,[4] made no significant concessions,[5] and advanced proposals which would cut back on existing terms and conditions.[6] At the same time, the Respondent sought through its proposals to ensure that the Union would have no role in the representation of bargaining unit employees by taking an intransigent position against including arbitration, visitation, dues checkoff,[7] union security, or any provision for union postings at the facility. While the Respondent was not compelled to agree to any particular proposals by the Union, we find that, viewed in their totality, the Respondent's substantive proposals constitute additional evidence of the Respondent's bad faith.

In sum, the Respondent used evasive bargaining tactics to avoid providing clear information about existing employment policies, refused to put agreements in writing, pretended to make concessions while preserving its proposals in other parts of the contract, and insisted on proposals which would leave the Union with fewer rights than provided by law without a contract. During the same period of time, the Respondent declared impasse when the parties were not at impasse and committed several unfair labor practices designed to ensure that the Union would have no role in representing its employees.

We conclude that the Respondent's conduct in its totality evinced its contempt for the bargaining process and violated Section 8(a)(5) and (1) of the Act.[8] *Hydrotherm*, 302 NLRB 990 (1991); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Prentice-Hall*, 290 NLRB 646 (1988).

The General Counsel has requested a 1-year extension of the certification year to remedy the Respondent's unlawful refusal to bargain in good faith. As the Respondent has from virtually the outset of the certification year bargained in bad faith and without an intent to reach agreement, we shall modify the recommended Order to include specific affirmative language extending the certification year for a period of 1 year on the resumption of bargaining. *Hydrotherm*, supra, 302 NLRB 990; *Glomac Plastics*, 234 NLRB 1309 (1978).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Bethea Baptist Home, a division of South Carolina Baptist Ministries for the Aging, Inc., Darlington, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

[3] Member Oviatt does not rely on the decision in the above paragraph in concluding that the Respondent failed to bargain in good faith.

[4] The Respondent was unyielding in its insistence on no arbitration in combination with sweeping provisions in its management-rights clause that arrogated to the Respondent the exclusive right to change or abolish job classifications, to discipline, including discharge, without just cause, to change unilaterally all existing working conditions and fringe benefits not provided for in the contract, to use leased employees and nonbargaining unit employees to perform unit work, and to promulgate and enforce rules governing the work and nonwork conduct of employees both during and outside of working hours. In addition, the Respondent maintained sole discretion over the granting of merit pay increases, which had no formal criteria, and which the Respondent admitted did not involve a ''formal or informal system,'' and ''didn't eliminate favoritism.'' See *Harrah's Marina Hotel & Casino*, 296 NLRB 1116, 1134 (1989) (unilateral control over merit increases with no recourse to grievance found to constitute one factor in determining bad-faith bargaining).

[5] See *Prentice-Hall*, 290 NLRB 646 (1988) (''[a]n employer of course may seek waivers that will eliminate or restrict the exercise of these rights during the term of a contract, but the Respondent's demands for sweeping waivers—viewed in the light of what it was offering in exchange—simply are not the behavior of an employer who is trying to achieve a collective-bargaining agreement''); *Hydrotherm*, 302 NLRB 990 (1991) (''the Respondent here was offering little more that the status quo in return for these sweeping waivers'').

[6] For example, the Respondent proposed increasing the length of the probationary period, increasing the number of part-time employees and decreasing the number of full-time employees, imposing more stringent sick leave requirements, eliminating its perfect attendance bonus day off, and increasing the full-time status requirements.

[7] The Respondent offered to grant dues checkoff only if the Union would agree to the Respondent's proposals regarding management rights, employment at will, employee integrity, and testing.

[8] The Respondent complains that the Union engaged in bad-faith bargaining tactics and delayed scheduling meetings, which would exonerate its own behavior. We do not agree. Although the Union may have proposed an arbitration provision after it had indicated that it was amenable to dropping the provision, the Union's arbitration proposal was made after the Respondent had embarked on its bad-faith course of conduct. We cannot conclude that this conduct and the scheduling delays warrant declining to find evidence of bad faith in the Respondent's pattern of conduct at and away from the bargaining table in the 17 months the parties were in negotiations. *Radisson Plaza Minneapolis*, 307 NLRB 94 fn. 13 (1992).

''(c) On request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the United Food and Commercial Workers Union Local 204, AFL–CIO, as the designated representative of the employees in the above-described appropriate unit, as if the initial year of certification has been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order in this case and, if an understanding is reached, embody it in a written, signed agreement.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with loss of benefits, loss of jobs, and more strict enforcement of work rules if they select United Food and Commercial Workers Local 204, AFL–CIO or any other labor organization as their bargaining representative.

WE WILL NOT coercively interrogate our employees about their union activities.

WE WILL NOT threaten our employees with unspecified reprisals if they select the Union as their bargaining representative.

WE WILL NOT discharge, suspend, refuse to accord employees full-time status, and issue warnings to our employees because of their protected activities.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All service and maintenance employees, including all regularly scheduled non-professional employees, including nursing assistants, orderlies, couriers, activities assistants, dietary employees, housekeeping and laundry employees, ward secretaries and groundsmen employed by us at our Darlington, South Carolina facility located at 3500 S. Main Street but excluding all office clerical employees, registered nurses, licensed practical nurses, professional and technical employees, painters, independent contractors, department heads, temporary, casual and on-call employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally implement terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse.

WE WILL NOT refuse to provide access to our facilities and refuse to furnish in a timely manner the Union with the information requested, which is necessary for the Union to perform its function as a representative of employees in the above-described unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL offer to Robert Dargan immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and immediately restore Patricia Harrison to a full-time position as nurses assistant, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or benefits, plus interest, they suffered as a result of our illegal actions.

WE WILL rescind our discharge, suspension, refusal to accord full-time status, and illegal warnings issued to Robert Dargan, Patricia Harrison, and Carol Bishop and remove from our files any references to the illegal actions and notify each of those employees in writing that this has been done and that evidence of our unlawful actions will not be used against them in any way.

WE WILL grant retroactively wage increases which were illegally withheld from bargaining unit employees in January 1990 and January 1991.

WE WILL, on request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the duly designated representative of the employees in the appropriate unit described above, as if the initial year of certification has been extended for an additional 1 year from the commencement of bargaining pursuant to the Board's Order, and, if an understanding is reached, embody it in a written, signed agreement.

WE WILL, on request by the Union, revoke the unilateral changes in the rates of pay, wages, and other terms and conditions of employment that were placed into effect among employees in the appropriate bargaining unit, until such time as we negotiate with the Union in good faith and an impasse in negotiations is reached.

WE WILL furnish the Union with the information requested and provide the Union access to our facility, which is necessary for the Union to perform its function as a representative of employees in the above-described unit.

BETHEA BAPTIST HOME, A DIVISION OF SOUTH CAROLINA BAPTIST MINISTRIES FOR THE AGING, INC.

Patricia L. Timmins, Esq., and *Joseph Timothy Welch, Esq.*, for the General Counsel.
Stephen T. Savitz, Esq. (Gignilliat, Savitz & Bettis), of Columbia, South Carolina, for the Respondent.
Renee L. Bowser, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Darlington, South Carolina, on September 23 through 26 and December 9 and 10, 1991.

A sixth order consolidating cases and consolidated complaint issued on July 31, 1991. On September 6, 1991, the complaint was amended. The earliest of the charges involved in this matter was filed on August 25, 1989. General Counsel contends that Respondent engaged in unlawful conduct in opposing the Union during an organizing campaign, that Respondent unlawfully discriminated against some of its employees because of the union activity, and that, following the Union's election victory, Respondent engaged in unlawful bargaining and that it made illegal unilateral changes in working conditions.

Respondent admitted the jurisdiction and commerce allegations. It is a South Carolina corporation with a facility in Darlington, South Carolina, where it is engaged in the operation of a residential and nursing facility. During a representative period Respondent, in the course and conduct of its business, received goods and materials at it Darlington facility valued in excess of $50,000 from locations within the State of South Carolina from enterprises which were directly engaged in interstate commerce. Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (Act). Respondent also admitted that the Charging Party (Union) is a labor organization within the meaning of Section 2(5) of the Act.

In 1989, Respondent's employees engaged in a campaign to organize Respondent's facility to be represented by the Union.

The record proved that Respondent learned of its employees' union organizing campaign when it received a letter on the Union's letterhead, signed by 26 employees dated June 15, 1989. The Union prevailed during an August 3, 1989 election by a vote of 50 for and 14 against. The Union was then certified as bargaining representative of the following described unit, on August 11, 1989.

> All service and maintenance employees, including all regularly scheduled non-professional employees, including nursing assistants, orderlies, couriers, activities assistants, dietary employees, housekeeping and laundry employees, ward secretaries and groundsmen employed by the Respondent at its Darlington, South Carolina facility located at 3500 S. Main Street but excluding all office clerical employees, registered nurses, licensed practical nurses, professional and technical employees, painters, independent contractors, department heads, temporary, casual and on-call employees, guards and supervisors as defined in the Act.

Respondent admitted that the Union has since August 11, 1989, been the exclusive collective-bargaining representative of Respondent's employees in the above-described appropriate collective-bargaining unit.

The 8(a)(1) Allegations

Eddie Gregg—June 26, 1989

Threatened Loss of Benefits

Nathaniel Gregg, who is employed in the grounds keeping department with Respondent, testified that his supervisor Eddie Gregg held a meeting at work with the employees on June 26, 1989.

Gregg recalled that other employees, Ernest Bridges and Robert Samuel, were present. Supervisor Eddie Gregg is not related to Nathaniel Gregg.

Supervisor Gregg told the employees that it would not profit them to have a union because his wife was in the Union and it ended up getting her fired. Also, with the Union our insurance benefits and our lunch benefits would be cut. At that time the employees received free lunches. Gregg told the employees that if they went for the Union they would lose their friendship with supervisors and it could cause hardships.

Robert Samuel, who formerly worked in Respondent's grounds keeping department, also attended the June 26 meeting held by Supervisor Eddie Gregg. Samuel agreed with Nathaniel Gregg that Eddie Gregg told them they would probably lose their benefits if the Union came in including their insurance, food privileges, and some of their benefits.

Ground Maintenance Supervisor Eddie Gregg testified that he did not recall the June 26 meeting described by Nathaniel Gregg and Robert Samuel. Gregg did admit to one conversation with employee Ernest Bridges, about the Union. Gregg testified that Bridges asked him what he thought about the Union and Gregg told Bridges that he did not want to get involved. However, Bridges asked again for Gregg's thoughts. Gregg testified:

> I told him at the time that—that I specifically do not like (unions) because it was a right to work state and I felt like it was not be—it would not value in a right to work state as it would be in a closed shop state, form [sic] my knowledge of what I knew about Unions and then he asked me also, so I—do I—do—I know anything else about it and I said my wife works in the Union.
>
> And—and I told him that my wife were [sic] in the Union there and she was a shop steward there before it's closed down Electric Motor was a shop steward there and I told him that before as of the things that

> I've seen through the years and time that, that was the reason why I personally from experience and also knowledge of what's going on, that I felt like it was not the best of interest—it was not in his best interest.
>
> . . . .
>
> Benefits was not talked about whatsoever. Not with him and I, the only thing I told him and I talked about—only one thing I said, in negotiations I said, the company and the Union negotiate and I said, I'm not in the position to tell you anything other than that.

Findings

I was not convinced that Eddie Gregg was truthful in his denials. The subjects he admittedly discussed with Ernest Bridges were similar to those he allegedly brought up during his June 26 meeting. I was not impressed with Eddie Gregg's demeanor whereas I was impressed that both Nathaniel Gregg and Robert Samuel were being truthful in their account of the June 26 meeting.

I find that the credited evidence proved that Supervisor Eddie Gregg threatened his employees that they would probably lose their benefits including free lunch and insurance if the Union was selected.

Respondent in its brief argues that regardless of factual findings regarding the alleged 8(a)(1) violations, in truth, Respondent placed a clamp on all supervisory conversations on the subject of the Union immediately on discovering its employees were involved in a union campaign. On that basis Respondent argues that any comments by Supervisors Gregg and McKenzie were isolated and had no effect on the employees. Respondent cited *Telex Communications*, 294 NLRB 87 (1989), and *Color Tech Corp*., 286 NLRB 476 (1987).

I have considered the allegations in this instance against all the circumstances as revealed through record evidence and I find that the record shows that this was not a case of isolated activities which had no effect on the employees.

Those threats constitute a violation of Section 8(a)(1) of the Act. *Standard Products*, 281 NLRB 141 (1986); *Minette Mills*, 305 NLRB 1032 (1991).

Jerome McKenzie

Threatened Loss of Benefits

Janice Lunnon, a former housekeeping employee for Respondent, testified that she attended a meeting at work of the housekeeping employees on June 26, 1989. Supervisor Jerome McKenzie held the meeting which included employees William Pierce, Michael Johnson, Elizabeth Fox, Jeramy Dargan, and Vivian Linen.

Lunnon recalled McKenzie talked about the Union, telling the employees that if the Union came in that their benefits may be cut, and their meals may be cut and that if they got tough with him, he would have to get tough with the employees.

William Pierce, who until recently worked in housekeeping for Respondent, testified about the June 26 meeting held by Supervisor Jerome McKenzie. As shown below McKenzie talked some about Carol Bishop. As to the Union itself, McKenzie told the employees that before they get their money the Union would get theirs, and that the home did not have much to offer the Union. McKenzie told them that their free meals would probably be cut and their benefits would be cut out.

Threatened Loss of Jobs

As shown Janice Lunnon testified about a meeting held by Supervisor McKenzie with the housekeeping employees on June 26, 1989. Lunnon recalled that McKenzie also talked about another employee named Carol Bishop. McKenzie told the employees:

> [McKenzie] said they don't have enough evidence anyway, and Carol Bishop probably will be fired. . . . I don't know exactly what [Carol Bishop] does, but she works at the desk in the infirmary.

William Pierce, whose testimony is discussed above regarding Jerome McKenzie's June 26 meeting, recalled that McKenzie commented some about Carol Bishop:

> . . . the Union. He says they was not enough evidence to prove anything on the Home anyway. And then, after that most of the person would lose in this case would be Carol Bishop. . . . She work at Bethea Baptist Home and she was one of the Job Stewart, represented the Union. . . . He said, after this was over with, she would probably get fired after this.

Threatened More Strict Enforcement of Rules

Both Janice Lunnon and William Pierce recalled that during the June 26 meeting Supervisor McKenzie while talking about the Union said that if they got tough or hard on him that he would have to get tough on the employees.

Interrogated its Employees

Former housekeeping employee Janice Lunnon testified that her supervisor Jerome McKenzie spoke to her a couple of days after June 26, 1989:

> He asked me how many meetings have I attended, what did the Union promise me, and what were the Union dues. I told him I had been to one meeting and if he wanted to know anything else he would have to ask Carol Bishop.

Lunnon testified that she did not openly support the Union.

William Pierce testified that he had a conversation regarding the Union with Supervisor Jerome McKenzie about a week or two after the June 26 meeting held by Pierce:

> [H]e asked me did I attend the Union meetings and I told him yes, I did.

Findings

Director of Housekeeping Jerome McKenzie admitted that he occasionally held meetings with his employees. However, he denied that he ever held a meeting to discuss the Union and he did not recall whether he held a meeting on June 26. According to McKenzie the only conversations he had with his employees about the Union occurred one morning when, in separate incidents, he asked employees William Pierce and Vivian Linen if they had heard anything about a union meet-

ing. He recalled that Vivian Linen responded to him that she had attended the union meeting and if he wanted to know more about it he could ask Carol Bishop.

I was impressed with the demeanor of Janice Lunnon and William Pierce. Their testimony was clear as to Jerome McKenzie's meeting with his employees. I am convinced that McKenzie was not truthful in his denials. I was especially concerned with McKenzie's demeanor when he was asked about his position regarding the Union. McKenzie was obviously uncomfortable when he testified to the effect that he had little interest in the union issue.

I credit the testimony of Janice Lunnon and William Pierce.

Moreover, as shown above McKenzie admitted that he questioned two employees about their attendance at union meetings.

As noted above, Respondent in its brief argued that regardless of factual findings regarding the alleged 8(a)(1) violations, in truth Respondent placed a clamp on *all* supervisory conversations on the subject of the Union immediately on discovering its employees were involved in a union campaign. On that basis Respondent argues that any comments by Supervisors Gregg and McKenzie were isolated and had no effect on the employees. Respondent cited *Telex Communications*, 294 NLRB 87 (1989), and *Color Tech Corp*., 286 NLRB 476 (1987).

As mentioned above, the record shows that this was not a case of isolated activities which had no effect on the employees.

The evidence proves that McKenzie threatened his employees with loss of benefits; loss of job by union supporter Carol Bishop; and more strict enforcement of work rules. *Standard Products*, 281 NLRB 141 (1986); *Minette Mills*, supra.

Shirley Young—June 23, 1990

Threatened Unspecified Reprisals

Nurses Aide Emma Jean Ford testified that she and two other nurses aides were called over by Shirley Young on the morning of June 23, 1990:

> Ms. Young was coming up the hall and she had a cart where she, you know, keeps the medicine on that she gives out to the patients. I thought she was calling us to call our attention to something, you know, that was dealing with the patients. But it was about—She was saying, ''Let me tell you something.'' Gathering us all up or calling us all back. We were all there putting trays on a buggy. ''Well, tell me something, do you all hate [Director of Nurses] Ms. McIntyre?''
>
> . . . .
>
> She said, ''You all hate her. Is this why all of this union mess is going on?''
>
> At the time, nobody said anything because we thought it was all about work, but when she brought up about a union, then we looked at her and she said, ''Is that why it is, all this staying out? Is this it?''
>
> . . . .
>
> Then she said, ''Don't you know that if this was another nursing home and you had been gone or if I was the supervisor, I'd done fired the whole lot of you. Anyway, when this union mess is over, we are going to clean house.''

Shirley Murray, who has worked for Respondent for 24 years, also testified about the June 23 incident involving Young. Murray recalled that Patricia Harrison and Imogene Foley were also present at the time she talked with Young. Murray recalled that among other comments, Shirley Young told them that when this union mess is over McIntyre was going to clean house.

Shirley Young testified that she did not recall the above incident and that she felt she would have recalled it had it happened. Young testified that Shirley Murray did not like her because Young had called Murray down on several occasions; that Murray was rude to patients and Murray was one that would always talk back to Young.

Findings

I was not impressed with the demeanor of Shirley Young. Her testimony as to this particular allegation was evasive. Although she did recall one conversation where she questioned why the nurses aides did not like the director of nurses, she testified that she could not recall a statement that McIntyre would clean house after this union mess. In that regard Young's testimony conflicted with two other witnesses.

Respondent pointed out that General Counsel failed to call two other witnesses that were present when Young allegedly made statements about cleaning house. That is true. However, that argument cuts both ways, neither did Respondent call anyone else.

Respondent also argues that the failure to ask Patricia Harrison who was an alleged discriminatee and did testify about other matters, about the alleged violation by Shirley Young illustrates that if asked, Harrison would have testified contrarily to Murray and Ford.

I have taken Respondent's argument into account in making my credibility determinations. However, in view of what Shirley Young admittedly said, and the accounts of the incidents by Murray and Ford, I am convinced they testified honestly and credit their testimony.

In making my credibility determinations I have considered demeanor plus the fact that Shirley Young's testimony conflicts with several other witnesses regarding this allegations as well as the allegations involved in the discharge of Robert Dargan. I find that I cannot credit her testimony to the extent it conflicts with other evidence. I do credit the testimony of Emma Ford and Shirley Murray to the effect that they were told by Shirley Young, an admitted supervisor, that the director of nurses would clean house after the union mess was over.

I find that statement by Young constitutes a threat to the employees of discharge because of the employees' union activities in violation of Section 8(a)(1) of the Act. *Minette Mills*, 305 NLRB 1032 (1991).

The 8(a)(3) Allegations

Carol Bishop

The first signature on the June 15 letter on the Union's letterhead to Respondent advising of the organizing campaign was Carol K. Bishop.

In addition to signing the June 15 letter, Carol Bishop assisted employees signing union authorization cards; scheduled meetings for the employees with the Union; talked to employees about the Union while at break at work; met with employees in the parking lot after work and discussed the Union; passed our union leaflets to employees; was selected head steward for the Union; and was the union observer at the August 3, 1989 election.

Carol Bishop's job was ward secretary.

Janice Lunnon and William Pierce testified that during a talk against the Union, their supervisor told them during a June 26, 1989 meeting at work, that Carol Bishop would probably be fired.

August 4, 1991

Carol Bishop signed in for her shift on August 3 at 6 a.m. On the sign in sheet Bishop testified that she wrote in, in parenthesis ''(election in Chapel).'' Bishop did not notify supervision that she was serving as union observer during the election. However, several supervisors including Jerome McKenzie, housekeeping supervisor, and Fran Greer, activity director, as well as Julian Gignilliat, Respondent's attorney, saw her during her activities as observer.

During the times on August 3 when Bishop was not involved in her role of union election observer, she reported to her work station and performed her job duties. No one said anything to her about that practice on August 3.

On her next workday, Bishop was called into the office of Director of Nursing Linda McIntyre and handed a sealed envelop. She opened the envelop and asked what it was about. McIntyre replied that she could not talk about it. The envelop contained a warning to Bishop, for ''leaving work area without permission.'' The warning which was signed by Linda McIntyre reads:

> On Thursday August 3, 1989 I arrived at work at 7:15 a.m. and did not find Mrs. Bishop at the nurses desk on main nor on the hall and no one knew where she was at that time. Mrs. Bishop arrived on the floor at 7:45 a.m. I later was informed that Mrs. Bishop had been working at the election process in the chapel between the hours of 6:30 a.m.-7:30 a.m. She was scheduled to work from 7 a.m.-3:00 p.m. and had not requested nor informed the director or asst. director of nurses of this change in her plans. The same situation occurred in the afternoon as she left the floor at 2:00 p.m. and did not return.
>
> Mrs. Bishop signed in on the Bethea time sheet at 6:00a.m. Mrs. Bishop failed to follow proper steps to report out of work or tardiness.
>
> Mrs. Bishop should have requested time off. She is a part off [sic] the Bethea staff and must adhere to the same guidelines as others.

Linda McIntyre testified that when she came into work on August 3, Carol Bishop was not at her work station and the sign in sheet showed ''Carol 6:00.'' According to McIntyre there was no entry referring to the chapel or to the NLRB election. Later that day an entry was made next to ''Carol 6:00.'' That entry appears to be ''2:00 in Chapel.'' Carol Bishop worked as union observer during the morning session and again during the afternoon session which started at 2 p.m.

McIntyre testified that the procedure at that time was for employees to not leave their work station without letting someone know and to make sure that everything was alright on the floor before leaving.

Carol Bishop testified that before August 3, 1989, she occasionally left her work station without permission including times when she and other employees would leave and attend yard sales. Those yard sales included sales conducted by residents of the cottages and, on occasion, by Respondent's former administrator Horace Hawes. Bishop recalled attending yard sales during 1988, 1989, and 1990. Although she did not notify anyone she was leaving to attend the yard sales during her work shift, Bishop testified that supervisors were oftentimes aware of her absence; that some supervisors attended the yard sales themselves and, on occasion, the employees rode to the sales with supervisors. Bishop testified that she stayed 25, 30 minutes or more, at the yard sales.

Bishop testified that neither she, nor, to her knowledge, any other employee was ever disciplined for leaving their work station until August 4. She testified to several other examples of employees leaving their station without notice to supervision.

On cross-examination, Bishop was shown a warning which she signed on February 2, 1986, for leaving her work station for 1-1/2 hours to 1 hour 45 minutes.

Nurses Aide Emma Ford testified that employees occasionally attend yard sales during working hours without notifying supervision. Ford testified that she attended yard sales during 1988 and 1989 during working hours without signing out or otherwise notifying supervision and that she was not disciplined for leaving her work area.

Shirley Murray testified that she has attended garage sales on several occasions including one in 1991. On that occasion she, along with Marie Mack and Carol Bishop, left work during working hours. Murray did not notify supervision that she had left and she was gone for 15 or 20 minutes. According to Murray it was the custom to leave and attend garage sales provided someone else was on the floor to cover while the aides were at the garage sale. Murray testified that nurses as well as nurses aides, attended the sales and that someone was left to cover the patients but that nothing was said to supervision. Murray has seen supervisors at the garage sales.

Murray also testified about an incident in May 1991 when Pat Freeman, a supervisor nurse, phoned her and asked her to send two couriers (employees) back to the main nurses station. Freeman told Murray that the couriers had left their station without permission. Murray told the two couriers about Freeman's call and they left to return to the main nurses station.

Nurses Assistant Marie Ann Mack testified that she has attended yard sales away from work without notifying supervision and that she has occasionally seen her supervisors at the sales.

Respondent called Sadie Stewart, who formerly worked for Respondent as a licensed practical nurse (LPN). Stewart testified that it was the practice for the employees to always get permission before leaving their assigned floor.

Findings

The general facts do not appear to be in dispute regarding this particular allegation. There were some minor disputes such as what did Carol Bishop write on the clock in log and whether she wrote comments in the log at 6 a.m. or after lunch. In that regard it appears that Bishop was incorrect in her recollection of the time log entry. Although she recalled that she wrote in election in the chapel when she originally clocked in that morning at 6 o'clock, the log itself shows what appears to be 2 p.m. in chapel.

Respondent attacked evidence of disparate treatment by arguing that supervisors either approved employees leaving work to attend garage sales or the supervisors never knew the employees had left. In either case, according to that argument, disparity is not shown since no supervisor approved Carol Bishop's absence and supervision did learn that she was absent.

However, the evidence does not support Respondent's argument. As shown above, some of the employees testified to instances where they went to garage sales without notifying their supervisor and actually saw their supervisors while at the sale. None of those people were disciplined.

Respondent did argue that occasionally employees are disciplined for being away from their duty station. In fact the only example of such discipline involved Carol Bishop. Bishop was awarded a personnel incident report in February 1986 for being away from her duty station for 1-1/2 hours without authorization.

No one else has received a written disciplinary action including the two couriers that were called back to their duty station by Pat Freeman. Neither was anyone ever disciplined because they attended a garage sale.

Respondent also argued that common courtesy should have prompted Bishop to give advance notice before leaving her work station.

In fact, the record is replete with examples of both supervisors and employees engaging in conduct which illustrated that they oftentimes refused to practice common civility toward one another. Common courtesy and, in fact even civility, appear to be lacking among the employees and supervisors of Respondent.

Be that as it may, it is not my job to correct or to admonish either party in that regard. What I must determine is whether Respondent engaged in unlawful action as alleged in the complaint. In regard to this particular allegation I must determine if Carol Bishop was disciplined because of her union activity and would she have been so disciplined in the absence of her union activity.

Respondent in support of its defense cited *Mulay Plastics*, 291 NLRB 708 (1988); *Elston Electronics Corp*., 292 NLRB 510 (1989); *United Cloth Co*., 278 NLRB 583 (1986); and *Cherokee Heating Co*., 280 NLRB 399 (1986).

I am mindful of the fact that an Respondent must be able to rely on its employees to man their work stations. However, in this instance the record shows that employees were routinely permitted to leave their work stations for periods as long as the two occasions on which Bishop left her station to act as election observer, and no one was ever disciplined. The only instance of disciplinary action involved Carol Bishop in February 1986 and that involved a much longer absence—1-1/2 hours.

In instances where an employee is disciplined for engaging in union activities the test to be applied includes questioning whether the employer reasonably believed that the employee engaged in misconduct of the type which is not normally condoned by the employer; and, if so, whether the employee actually engaged in the misconduct. (*Rubin Bros. Footwear*, 99 NLRB 610 (1952); *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

In determining whether the employer reasonably believed that the employee engaged in misconduct, I must consider the question of disparity.

In that regard it appears that Carol Bishop was treated differently than employees that absented themselves from their work for other than union activities. I find that Bishop was disciplined because of her activity as union observer and the evidence illustrated that Respondent did not reasonably believe that she had engaged in activity of the type it did not normally condone.

September 8, 1989

The Warning for Lying

Carol Bishop received two warnings on September 8. One was for ''lying,'' and it read:

> Yesterday I asked if you had called Lisa McPhail (your sister) about working 3–11 as we were short staffed. You told me that she was out of town. Not more than 15 minutes later I called Ms. McPhail's number and she answered and agreed to come to work after her check-up appt. that was scheduled for 2:00 p.m. She reported to work at 5:10 p.m. In my opinion you intentionally lied to me. This is a warning and if problems of this sort arise in future, you will be discharged.
>
> /s/ Linda McIntyre

Carol Bishop testified that she was asked by Linda McIntyre why her sister had switched days with another employee and she was asked if she thought her sister would agree to come in and work that day. Bishop told McIntyre no she did not believe her sister would agree to come in that day. According to Bishop, McIntyre did not ask Bishop to phone her sister.

Nurses Assistant Billie Ann Ellerbe testified that she was present during the conversation between Carol Bishop and Linda McIntyre. Ellerbe recalled that McIntyre asked Bishop if she thought her sister would come in to work that afternoon. Bishop replied no because Lisa McPhail, Bishop's sister, had phoned her and asked her to pick up her check. Ellerbe testified that McIntyre did not ask Bishop to phone her sister.

Lisa McPhail testified that she was not working on September because she had a 2 p.m. appointment. She phoned the home and asked her sister, Carol Bishop, to pick up her check. According to McPhail nothing was said about whether McPhail could work that day nor was anything said about McPhail going out of town. McPhail testified that later that same day she was phoned by Director of Nurses McIntyre. McIntyre asked McPhail if she could work in place of another nurses aide. When McPhail explained that she had a 2 p.m. appointment, McIntyre asked her to come in when-

ever she could after the appointment. McPhail did come in beginning at 5:15 p.m.

McPhail testified that McIntyre did not ask her about whether she had talked with her sister Carol Bishop about working that day or about her plans for that day.

Linda McIntyre presented a different version. According to McIntyre she had asked Carol Bishop to try and get someone to work the 3 to 11 shift. When Bishop came in the office to pick up her check she also asked for her sister's check. At that time according to McIntyre, McIntyre asked Bishop if she had called her sister and Bishop replied that she had not phoned Lisa McPhail because her sister was out of town. Shortly thereafter McIntyre phoned McPhail who answered the phone. McIntyre arranged with McPhail for her to come in after she finished a doctor's appointment that afternoon.

Findings

I was not impressed with the demeanor of either Carol Bishop or Linda McIntyre. I find that both occasionally exaggerated their testimony. However, I was impressed with the testimony of Billie Ellerbe and Lisa McPhail. Their testimony convinced me that Linda McIntyre fabricated the disciplinary notice alleging that Carol Bishop had lied about her sister leaving town.

As shown above, Carol Bishop was the most visible union supporter at Respondent's facility. Moreover, as shown above, even Respondent's supervision thought that Respondent would discharge Bishop because of her union activity. Jerome McKenzie told his employees that Respondent would discharge Bishop after the union mess was over.

In view of the above evidence and especially Respondent's announced animus toward Carol Bishop's union activities and Linda McIntyre's falsification of the basis for the disciplinary action, I find that Carol Bishop was disciplined on this particular occasion because of her union activities. Respondent failed to show that it would have awarded this disciplinary action in the absence of protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

The Warning for Insubordination

Respondent issued another warning to Bishop on September 8 for ''inappropriate conduct'':

> On September 7, 1989 a report on the patients was being given on Main hall. The report was being given to the oncoming staff. Carol Bishop, ward clerk, was filing materials in the metal file cabinet at the nurses desk. This cabinet contains patients files. She was continually opening and closing the cabinet doors. Sadie Stewart, LP.N asked Ms. Bishop not to do this while report was being given. Ms. Bishop responded, ''If you can tell me some way to do this quietly, I will.'' Mrs. Stewart then asked Ms. Bishop to wait until report was finished to complete her filing. Ms. Bishop then stated to Mrs. Stewart, ''You have your work to do and I have mine.'' With this Ms. Bishop continued to open and close the cabinet doors loudly. The nurses at the desk were Ruth Alstrom, L.P.N., Patricia Henningsen, L.P.N., Sadie Stewart, L.P.N. and Pat Freeman, R.N. This conduct was most inappropriate and will not be tolerated in the future. It in fact verged on insubordination. This is a warning.
>
> /s/ Linda McIntyre/Patricia L. Freeman

Bishop testified that she was filing two confidential reports from physicians regarding patients while a report was being given. Bishop testified that she was filing the confidential reports in accordance with her outstanding instructions. She was asked to wait until the report was completed to finish her filing but she went ahead and filed the two confidential reports.

Carolyn McPhail testified that she was present listening to the report as Carol Bishop was filing and that Bishop was not disruptive of the meeting. McPhail admitted that when she gave a prehearing affidavit she testified that the employee that was giving the report had a soft voice and we could not hear her anyway. McPhail now recalls that particular employee, Ms. Coker, did not give that report and was not at that report meeting.

Sadie Stewart, formerly an LPN for Respondent, testified regarding the incident. Stewart testified it occurred during a nurses' meeting conducted for the purpose of the outgoing shift informing the incoming shift of nurses as to ongoing conditions. Four nurses were involved in the meeting. Stewart testified that she asked Bishop to please be quiet after Bishop interrupted the meeting by opening and closing file drawers. Bishop responded to Stewart, do you know of a quieter way to do it and Stewart asked her to wait until the report was over. Bishop then said, ''Ms. Stewart, you have your work to do, and I have my work to do,'' and she continued to file.

Stewart testified that she wrote up the incident immediately after it occurred and gave that report to Director of Nurses McIntyre.

Patricia Freeman, who was then assistant director of nurses, testified that she was present during the report and observed the incident involving Carol Bishop. Freeman testified in accord with the testimony of Sadie Stewart.

Findings

Unlike the warning for ''lying,'' the record evidence here does support the factual basis for Respondent's action. The evidence including that of General Counsel's witnesses including Carol Bishop, illustrates that she was asked but refused, to stop disrupting the between shifts nurses' meeting.

In view of the evidence regarding Respondent's animus against Carol Bishop because of her union activities, a prima facie case may be made that Bishop's protected activities were considered in awarding her this particular warning. However, even if I should so find, I also find that Respondent proved that this warning would have issued in the absence of Bishop's union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

Changed Nature of Carol Bishop's Work Assignments

January 23, 1990

Carol Bishop testified that on January 23, 1990, she was told by Director of Nursing Linda McIntyre that her duties were being changed that day to include taking vital signs on all the patients. Before that time the responsibility for taking vital signs from the patients, had been limited to nurses assistant employees. Bishop, in her position as ward secretary, had not been given that assignment before.

Linda McIntyre admitted that she did assign Carol Bishop the duty of taking vital signs even though that was a duty handled by the nurses assistants. On occasion, according to McIntyre, she had assigned that duty to the couriers. But under routine circumstances vital signs were always taken by the nurses assistants.

McIntyre testified that on that occasion they were running short in nurses assistants and Bishop had missed several days over the past few weeks. McIntyre testified that during Bishop's absences the nurses had been able to handle Bishop's duties. Because of that knowledge and her knowledge that Bishop could perform the vital signs since she had been hired originally as a nurses assistant, McIntyre did instruct that Bishop was to take the vital signs.

January 25, 1990

When Carol Bishop came in to work on January 25, she was told by the night nurse (supervisor), Elizabeth Kinley, that Director of Nurses McIntyre had phoned and instructed her to assign Bishop a group of patients. There were seven to nine patients in the group assigned to Bishop, which is the normal size of a full patient load.

Before that time patient groups had been assigned to nurses assistants and not to ward secretaries.

Elizabeth Kinley was called by Respondent. Kinley agreed with Carol Bishop's testimony. According to Kinley she was phoned by Director of Nurses McIntyre about 2 a.m. and told to assign Carol Bishop to work as a nurses aide when Bishop reported to work for the 7 a.m. to 3 p.m. shift. Kinley said that in the past before that incident, she knew that occasionally couriers were assigned nurses assistant's duties and that Carol Bishop, as ward clerk, was the only other nurses type personnel other than nurses aides and nurses.

According to Bishop there were no changed conditions such as shortage of normal work in her duty as ward secretary or increase in number of patients or shortage of nurses assistants, which would necessitate the changes in her job duties on January 23 and 25.

Shirley Murray who has worked for Respondent for 24 years testified that it was not customary for Respondent to assign any of the nurses aide's duties to ward secretaries and that nurses aide's duties included taking vital signs.

Director of Nurses McIntyre testified there was a shortage of nurses aides on that occasion, that she felt the duties of nurses aides were more important than those of Carol Bishop's regular job, and for those reasons she instructed the reassignment of Bishop on that occasion.

October 31, 1991

Carol Bishop testified that after she testified in these proceedings on September 23, 1991, during the break between sessions on October 31, 1991, while she remained employed as ward secretary, she was told by Assistant Director of Nurses Pat Freeman that the Director of Nurses Kay Matthews wanted her (Bishop) to take all the patients vital signs that morning. Freeman told Bishop that she had told Matthews that the nurses aides could do the vital signs because that is what they normally do but that Matthews insisted that Bishop take the vital signs that day.

Nurses Assistant Linda Pauley testified that on October 31, 1991, she was asked by Director of Nurses Matthews to go to the chapel to assist with the residents. She told Matthews that she had not finished taking the vital signs of her eight patients. Matthews responded to her that Carol Bishop would take the vital signs.

Pauley said that she routinely helps patients in activities such as bingo and Bible quizzes and that this was the first time when she was told that someone else would take the vital signs. Normally Pauley takes her patients vital signs regardless of other patient activities.

Carol Bishop testified that something was occurring in the chapel that day and she remembered Kay Freeman saying that she wanted the residents in the chapel. Bishop believed it may have been a Halloween party. Bishop observed no effect on the nurses aides because of the occurrence in the chapel. Nurses aides do assist with events in the chapel such as bingo and Bible quizzes, and it does not normally impact on their taking of vital signs according to Bishop.

Bishop testified that she took vital signs of some 30 to 32 patients in accordance with Matthews' instructions. She was not limited solely to Linda Pauley's patients.

Bishop testified that she continued to perform her normal duties in addition to taking vital signs as time allowed throughout the day. Due to the added work caused by her taking the vital signs, Bishop was unable to take either of her two breaks that day.

Director of Nurses Matthews agreed with the above evidence. However, Matthews testified that on one occasion during a staff meeting, Carol Bishop suggested assigning the taking of vital signs to specific employees and Bishop suggested that either she or the couriers would be good ones for that assignment. Additionally, Matthews testified that she intended that Bishop would only take the few vital signs left by Linda Pauley being reassigned to assist with the Halloween party. Matthews did not intent for Bishop to take the vital signs for all the patients.

Patricia Freeman testified that the incident involving Carol Bishop being asked to do vital signs, came about because Linda Pauley had to go somewhere with one of the residents. Pauley told Freeman that she had caught up all her work except for vital signs. Freeman planned to ask one of the other nurses aides to take Pauley's vital signs but Director of Nurses Matthews told her to have Carol Bishop take the vital signs because they had not been completed.

On cross-examination, Bishop testified that she has on occasion been asked by Kay Matthews to aid in passing out food trays to the residents and that she has done so on those occasions. Bishop recalled those occasions happened during 1991.

On one occasion during the summer of 1991, Bishop told Matthews that she could assist the aides during an emergency but Matthews told her that she wanted her to remain at her work station where she could answer the phone.

Findings

As to the January 23, 1990 incident, Director of Nursing McIntyre admitted given the instructions to Bishop. McIntyre justified her action by testifying that the nurses had been able to handle Bishop's duties during Bishop's absence during several days over the 2 months before January 23 and that freed up Bishop to assist in problems caused by a shortage of nurses assistants. Bishop had missed several days because of her involvement in an auto accident.

As to past practice, before January 23 Carol Bishop, as ward secretary, was never assigned nurses assistant duties.

Despite testimony that Kay Matthews intended that Carol Bishop should take the remaining vital signs for Linda Pauley, the record does show that the instructions to Bishop were to take vital signs. I credit the testimony of Carol Bishop in that regard.

As noted above, Carol Bishop was known by Respondent as an outspoken advocate for the Union. Bishop was the Union's election observer and served on the Union's negotiating committee. As shown below, the parties met and bargained on January 18, 1990. As to related activity before October 31, 1991, Carol Bishop had testified on September 23, 1991, during the first session of these proceedings.

I find that General Counsel proved a prima facie case by showing that Respondent changed Carol Bishop's job duties during her obvious union activities at a time when there were ongoing contract negotiations in the first two instances, and during the break between hearing sessions on the third occasion shortly after Bishop had testified. Respondent failed to show that those change in duties would have occurred in the absence of Bishop's protected activities. In the past those duties had routinely been assigned to nurses assistants or, in extraordinary situations according to the testimony of former Director of Nursing McIntyre, to couriers. Respondent did not show why it did not follow those established practices on these three occasions. Respondent failed to prove that it would have changed Bishop's work assignments in the absence of her protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., supra; *Delta Gas*, supra; *Southwire Co. v. NLRB*, supra; *Yaohan of California*, supra.

Refused to Accord Patricia Harrison Full-Time Employee Status

General Counsel contends that Respondent imposed more difficult working conditions on employee Patricia Harrison by denying her requests to convert from part-time to full-time employee. According to that contention, Respondent for the first time during 1990, imposed an additional condition which necessitated Patricia Harrison to agree to make herself available to work shifts in addition to her former shift, in order to become a full-time employee. Before that time, according to General Counsel, there was no requirement that employees work several shifts in order to qualify for full time status. General Counsel contends that that additional condition was required because of the employees' union activities. Although it was General Counsel's position that Respondent discriminated against Harrison continuously from around August 1990, the complaint which alleges this violation occurred in July 1991, was prompted both by an affirmative action against Harrison at that time and by Section 10(b) which prevented the complaint alleging a violation from August or September 1990.

This particular allegation and its 10(b) complexities were discussed on the record. The record reflected discussions showing that this matter was first brought out in relevant charges against Respondent in a June 3, 1991, amendment to the charge in Case 11–CA–14427. At that time on the record, around page 280 of the transcript, I pointed out to the parties the possibilities of findings regarding the period of time beginning 6 months before the June 3 amendment and that the parties should be aware of Section 10(b) of the Act and the June 3 time of the first allegation regarding this matter.

As shown below, Eileen Hanson testified that Respondent gave the Union copies of some postings for jobs during the December 18, 1990 negotiating session. One of those postings was for nurses assistants and that posting indicated that in order to qualify for full-time status the applicant must work all three shifts. Hanson testified that was the first time the Union was advised that was Respondent's policy at that time and that constituted an unilateral change in violation of Section 8(a)(5) of the Act. The discussion of that allegation below bears on the issues in the allegation regarding Patricia Harrison.

Patricia Harrison testified that before the union activity at Respondent's facility, she was classified as a full-time nurses assistant. At that time Harrison had worked from 7 to 3 on the first shift for 4 years. Before the union activities, Harrison had not been required to work shifts other than the first shift.

During the union campaign, Harrison wore union pins to work. She appeared on TV news and attended a union march. She talked to other employees about the Union.

Additionally, after the union organizing campaign Harrison enlisted the assistance of the Union by having Union Steward Carol Bishop go with her to talk about her replacing former full-time employee Lula Byrd on first shift. Harrison and Bishop talked with Director of Nursing Matthews in the fall of 1990.

According to Harrison, Respondent's practice before the union campaign for permitting part-time employees to convert over to full time was simply to permit part-time employees the option of converting over in order of seniority, whenever a full-time opening occurred.

From September 1989 for several months, Harrison was out of work on maternity leave. After returning to work, Harrison noticed in January 1990 that she was scheduled on both the first and second shifts. She protested to Director of Nurses McIntyre that she had arranged a babysitter for the first shift but could not find one for the second shift. Harrison agreed to McIntyre's request that she try and find a sitter for the occasions when she was scheduled to work the second shift.

However, Harrison was unable to find a sitter for the second shift and she had to miss all her assigned second shifts during January and February. On March 12, McIntyre phoned her and told her that she was being placed in part-time status because she had been unable to work her assigned second shifts.

By being placed on part-time status, Harrison lost all her benefits including vacation, sick pay, and insurance.

Linda McIntyre testified that she was director of nurses for Respondent from January 1989 until July 1990. According to McIntyre she never promised a new hire a particular shift. At one point, according to McIntyre, because they were assisted by student nurses from a local program, she had too many people on 7 a.m. to 3 p.m. but not enough on 3 to 11 p.m. Due to that problem she started rotating staff beginning with the least senior and moving back up seniority, to the 3 to 11 p.m. or the 11 p.m. to 7 a.m. shifts as needed, maybe four or five shifts per 5-week period. McIntyre agreed that during the progression of that practice she assigned Harrison, along with several others, to work three shifts at various times during assignment periods. McIntyre also agreed that Harrison came to her on March 2, 1990, and asked for reassignment because she could not find an babysitter and could not work the 3 to 11 p.m. shift. McIntyre refused Harrison's request.

McIntyre testified that she phoned Harrison on March 12, 1990, and told Harrison that she was being placed on part-time status because of her inability to work the 3 to 11 p.m. shift.

According to McIntyre she was phoned by Harrison on June 19, 1990, and told that Harrison could work ''some . . . 7 to 3, 11 to 7,'' because she had gotten a babysitter. McIntyre scheduled Harrison for some, according to her testimony, but Harrison did not work those times.

On cross-examination, McIntyre admitted that Alma Good was hired during November 1988 to work on the third shift. McIntyre was asked if she did not know that at that time Alma Good had a second job during the day taking care of a retired judge and McIntyre responded that she knew that Alma Good had a second phone number where she could be reached during days.

Linda McIntyre was asked about former full-time nurses aide Lula Byrd. After being shown work schedules for January 22 through May 6, 1990, McIntyre admitted that Lula Byrd had worked the first shift exclusively before she resigned. McIntyre admitted that Byrd's resignation created an opening on the first shift. However, even though she admitted that Byrd had been a full-time employee, McIntyre denied that her resignation necessarily created a full-time vacancy.

Patricia Freeman, who started working for Respondent in August 1989, and became assistant director of nurses on October 1, 1990, testified that while she was assistant director of nurses she assigned Harrison to work only two shifts after Harrison complained about working three shifts. Freeman testified that being relatively new she was unaware of any policy which placed limitations on working part-time employees on different shifts and she thought Patricia Harrison was part time. Harrison complained to Freeman that she could not work more than two shifts. Freeman agreed to Harrison's request. However, Freeman was subsequently told by Director Matthews that full-time employees were required to work all three shifts and that Harrison wanted to be full time.

Freeman testified as to what she learned to be Respondent's policy for qualifying to move from part time to full time:

> You work all three shifts. You're—you know, some them don't really have to, but the ones that work full-time, have to be available to be pulled into those shifts, if you need them any shift.

After first shift aide Lula Byrd resigned in August 1990, Harrison asked Director of Nurses Matthews for that position as a full-time employee. She was denied the position. Matthews told Harrison that she was not going to fill the position. However, after Harrison was assigned to work that vacant position on several occasions, she again asked about being given the position full time.

At that time Harrison attended a conference including Carol Bishop and both the Assistant Director of Nurses Freeman and the Director of Nurses Matthews. During that conference Pat Freeman said there was a new policy which required anyone wanting to convert to full time to demonstrate a willingness to work all three shifts. At that time the Union had not been advised of a change in policy or practice.

Carol Bishop testified that during the fall of 1990 after former employee Lula Byrd resigned, Patricia Harrison asked Bishop to go with her to talk with the then director of nursing, Matthews. Matthews had replaced Linda McIntyre. Bishop testified:

> she reminded Mrs. Matthews that Lula Byrd had worked full time, 7:00 to 3:00, and she was requesting that position. Mrs. McIntyre responded by saying she wasn't going to fill that vacancy.

Director of Nurses Matthews posted a notice of full-time vacancies for nurses assistants on November 21, 1990:

> Two (2) additional full time Nursing Assistant positions will be filled January 1, 1991. These positions will require that the Nursing Assistant work all three shifts as assigned. Interested Nursing Assistants should apply in writing to me by November 28, 1990.
>
> The employees who are given full time status must work their scheduled hours beginning immediately. If the scheduled hours are not worked, the employee will be returned to part time status and will lose full time benefits and someone else will be changed to full time status.

On cross-examination, Matthews was unable to recall whether on any occasion before November 21, 1990, a posted vacancy required working all three shifts with provisions for return to part time if three shifts were not worked. When shown a posting for an orderly position Matthews admitted that posting said nothing about working three shifts or about being restored to part-time status if the employee failed to work all three shifts.

In December 1990, Harrison was placed on full-time status but she was assigned all three shifts during the monthly schedules.

In January 1991, Harrison complained to Assistant Director Freeman that she was unable to work the 11 p.m. to 7 a.m. shift then return to work again at 3 p.m., because of her three children. Harrison was then converted back to part-time status.

Harrison talked with Director Matthews and pointed out that Respondent was hiring some new employees full time and that she needed to work full time on first shift. Matthews told her that she would have to show a willingness to work

at least two of the three shifts before she could qualify to convert to full time.

Harrison then met with the administrator, Hendrix, and explained her need to work full time on first shift. Harrison pointed out three new employees that she said were working more first shift than she was. Hendrix asked Harrison when this problem started and when Harrison replied it was under Director McIntyre, Hendrix replied that he could not do anything because it happened before he came to the home.

In late April 1991, Harrison told Assistant Director of Nurses Freeman that she could arrange to work two shifts, first and third, if that would enable her to convert to full time. Freeman told Harrison that she would pass that along to Director Matthews.

Subsequently Harrison made an appointment to discuss her request with Director Matthews. However, when Harrison arrived at the home for her appointment Matthews sent her word that she was sorry but she had forgotten a meeting and would not be able to meet with Harrison.

Harrison was involved in an auto accident and missed work from May 28 to July 2, 1991. Shortly before she returned to work Harrison went to the home for her paycheck and to review the schedule for July. She noticed that she was scheduled for the two shifts she preferred and she asked Director Matthews if that was full time. Matthews replied ''um-hum,'' which, according to Matthews signified yes.

Carol Bishop also testified about the summer of 1991:

> There was another occasion when Patricia Harrison came to pick her check up. This was 1991, this year. If I remember correctly, I believe it to be in July. It was sometime just here recently. Patricia was looking at her time schedule and Mrs. Matthews walked to the desk, the Director of Nurses, and Patricia looked over at her and said—she noticed that she had four to five days each week. Patricia said is this full time, and Mrs. Matthews responded by saying, uh-hum, and she walked off.
>
> Q. Okay. Until say September or October of 1989, what was your observation with respect to how people that had been working part time began full time?
>
> A. If there was a full time position available, for example, on that 7:00 to 3:00 shift, and if that employee wanted to work that 7:00 to 3:00 shift, and if she was next in line, meaning—I mean seniority usually—if she was there longer than the other employees, she would be given that shift.

When Harrison returned to work in July 1991 after her auto accident, she asked Assistant Director Freeman if her returning to full time meant her benefits had been restored. Freeman told Harrison she would have to talk with Matthews. Harrison brought up the same question in a conversation with Director Matthews around July 8 and Matthews told her that she was not full time. When Harrison reminded Matthews about their conversation a few days earlier when Matthews indicated ''um-hum'' to Harrison's question as to whether she was then full time, Matthews said that she did not remember that conversation.

Harrison reminded Matthews that Matthews had said that she had to work two different shifts in order to qualify for full time and that she was scheduled to work two shifts. Matthews showed Harrison the schedule. Harrison testified that the conversation continued,

> [The schedule] showed several employees working 2 different shifts and she said, you had already tried to work the 2 different shifts and I've already been through that and I'm not going to go through it again and she said, that in order to work—she said you can work 2 shifts but, you have to be able to work still all three, and she was showing me the schedule but, each person had 2 different shifts and it wasn't—it wasn't—it was different names.

Harrison testified that the schedule showed that no one was scheduled three different shifts.

Director of Nurses Kay Matthews testified that she did not recall any conversation in which she told Harrison that she was full time and she agreed that during the subsequent conversation which Harrison placed on July 8, she and Harrison had a disagreement over whether Matthews had told Harrison that she was full time.

According to Matthews the question during all her conversations with Harrison regarding full time was whether Harrison could work the 7 to 3 shift full time and, according to Matthews, she always told Harrison that she wasn't hiring anybody for straight 7 to 3 shift.

The record showed that Respondent has hired four full-time nurses assistants, two full-time orderlies and one full-time housekeeper since January 1, 1991. The nurses assistants were all hired during April 1991 and two of those new hires as nurses assistants have since quit.

The record also includes a letter from Respondent to the Union dated July 11, 1991 which includes the following:

> In that same letter you asked if Patricia Harrison has been reclassified to full time. No, she has not. You asked if she has not been so reclassified, why not ''since she has indicated her availability to work two shifts?''
>
> The reason Patricia Harrison has not been reclassified as full time is that since the last time she was put on the schedule as a full-time employee and asked to be removed from that schedule because she was unable to work any shift other than the first shift, there has been no vacancy for a full-time nursing assistant. When next Bethea decides to make an existing part-time nursing assistant full time, or to hire a new full-time nursing assistant, Ms. Harrison will be considered. As I have told you previously, if Ms. Harrison has *demonstrated* her ability to work on the shifts on which she is needed, she may very well be given another opportunity to serve in a full-time capacity. It will not be sufficient for her to ''indicate her availability'' to work such other shifts, since she has done that before and then not been reliable on any shift other than the first shift.
>
> I suggest that you advise Ms. Harrison to work whatever second and third-shift assignments she may be given as a part-time employee, and to volunteer for others. If she demonstrates that she can be relied upon to report for work on the less desirable shifts, then I would certainly be inclined to advise Bethea to award

her full-time status before any other nursing assistant is newly awarded such status.

Marie Ann Mack, a nurses assistant, testified as to at least six nurses assistants she recalled by name, that have been placed on full-time status since Patricia Harrison. Mack testified that she has observed from the posted schedules that those new employees are scheduled for two shifts. According to Mack, at least one of those new assistants, Angela Cribb, frequently trades off one of her shifts.

Lisa McPhail testified that she has not worked for Respondent for as long as Patricia Harrison. McPhail testified that she normally works the first shift and only on infrequent occasions does she work on another shift.

Carolyn McPhail testified that she started as a part-time employee 3-1/2 years ago. In June 1988, she asked for and became a full-time employee. McPhail testified that she was not told that she was required to work a specific number of shifts in order to become full time. McPhail also testified about an employee named Desi Lewis who quit then came back a week later. When Desi Lewis returned she returned as a full-time employee. Moreover, according to McPhail, Lewis only worked second and third shifts. McPhail recalled that incident of Lewis quitting and returning happened this past year.

In March 1991, McPhail was asked if she could work a shift other than her regular shift and McPhail declined to work the different shift which would have been the first shift. Her supervisor was Pat Freeman and Freeman said nothing to McPhail about shift requirements.

McPhail admitted on cross-examination that new employees are now required to be willing to work all three shifts. However, she does not know how long that requirement has been in effect. She testified that she has noticed on the schedule that the employees that work all three shifts are mostly the new employees.

Nurses Aide Emma Ford testified that she was formerly part time and that she was not required to agree to work any or all shifts before she was permitted to convert to full time. She testified that she has worked the same shift for about 15 years.

Shirley Murray who has worked at Respondent for 24 years testified there were no requirements to work several shifts at the time she was converted from part to full time.

Lisa McPhail testified there was no requirement that employees work more than one shift when she converted from part-time to full-time status during 1988.

Findings

I was not impressed with the testimony of Linda McIntyre. She was evasive and, on several occasions, not responsive to questions under cross-examination. Moreover, portions of her testimony including especially her responses that she did not remember whether she discussed the union campaign with her nurses was not believable.

As shown above, I was impressed with the testimony of Assistant Director of Nursing Patricia Freeman. I credit her testimony.

The unrebutted evidence shows that Patricia Harrison supported the Union.

At a time after director of nurses admittedly limited two recently employed nurses aides to a single shift, she told her assistant director of nurses that Patricia Harrison could not satisfy the full-time requirements by working only two shifts. Instead, according to the testimony of Assistant Director Freeman, McIntyre required Harrison to work all three shifts in order to be restored to full-time status.

From at least as early as the summer of 1990 when Lula Byrd resigned her full time nurses aide position on the first shift, there was a vacancy on the first shift. Linda McIntyre conceded that a vacancy existed on the first shift when Byrd resigned. Before her maternity leave Patricia Harrison had worked the first shift exclusively.

McIntyre testified about the assistance she received by using students on the first shift, but she offered no explanation regarding the vacancy created by Byrd's resignation and how it was a vacancy but not a full-time vacancy.

Finally in December 1990, Harrison was returned to full-time status.

However, as to the issue here, the events before December 1990 cannot be considered as violative conduct. As noted above, a 10(b) problem was discussed on the record. It was apparent to all parties that because of Section 10(b), none of the above action before December 3, 1990, fell within the scope of the complaint in this matter. Therefore it is only from that point in time, that the question of illegal discriminatory action may commence.

In January 1991, when Harrison had trouble making her third-shift assignments, she was returned to part-time status.

In April 1991, Harrison told Respondent that she was willing to work a two-shift schedule if that would qualify her for full-time status. Despite that request Respondent has continued to deny full-time status to Harrison.

The evidence indicated that Respondent has routinely allowed employees with less seniority than Harrison to maintain full-time status while working no more than two-shift schedules.

Linda McIntyre testified that employees are assigned to rotation schedules on the basis of seniority. Nevertheless, according to the testimony of Marie Mack, at least six nurses aides hired after Harrison have been placed on full-time status and are working no more than two shift schedules and, at least one of the six, frequently trades out one of her two shifts.

Lisa McPhail, who has less seniority than Harrison, normally works only the first shift and, only infrequently, works another shift.

As shown above, Carolyn McPhail refused to work an additional shift after being asked to do so, and she was not penalized.

The above illustrates a prima facie case of disparity. Since the 10(b) period commenced in early December 1990 and before, Respondent has discriminatorily refused to restore Patricia Harrison to full-time status. Despite requests from Harrison to comply with Respondent's changed requirements regarding full-time status, which she has made during and after December 1990, Respondent has continued to deny Harrison full-time status.

However, there remains the question of whether Respondent would have denied Harrison full-time status in the absence of her protected activities.

Respondent in its brief, argues that it is utter nonsense for Harrison to believe that it could work her full time on one

shift, arguing that nursing homes must work around the clock and man all shifts.

It is necessary to staff the home around the clock. However, despite that requirement the record evidence did show that Respondent has consistently worked many of its employees on either a single shift or regularly on one shift with occasional assignments to only one of the two remaining shift. With that evidence in mind the obvious question becomes why couldn't Harrison have a similar arrangement.

What the record does show is that Harrison continued to request first a single shift then on occasions including during March 1991, a regular shift with less frequent assignments to only one of the remaining shifts.

From the evidence it is apparent that Respondent eventually took the position that despite Harrison's requests and her assurances that she could work two shifts, the fact was that she had tried that on several occasions and failed. In that regard Respondent's attorney wrote the Union on July 11, 1991, regarding the Union's effort to have Harrison reinstated as a full-time employee. In a material portion the letter stated:

> In that same letter you asked if Patricia Harrison has been reclassified to full time. No, she has not. You asked if she has not been so reclassified, why not ''since she has indicated her availability to work two shifts?''
>
> The reason Patricia Harrison has not been reclassified as full time is that since the last time she was put on the schedule as a full-time employee and asked to be removed from that schedule because she was unable to work any shift other than the first shift, there has been no vacancy for a full-time nursing assistant. When next Bethea decides to make an existing part-time nursing assistant full time, or to hire a new full-time nursing assistant, Ms. Harrison will be considered. As I have told you previously, if Ms. Harrison has *demonstrated* her ability to work on the shifts on which she is needed, she may very well be given another opportunity to serve in a full-time capacity. It will not be sufficient for her to ''indicate her availability'' to work such other shifts, since she has done that before and then not been reliable on any shift other than the first shift.
>
> I suggest that you advise Ms. Harrison to work whatever second and third shift assignments she may be given as a part-time employee, and to volunteer for others. If she demonstrates that she can be relied upon to report for work on the less desirable shifts, then I would certainly be inclined to advise Bethea to award her full-time status before any other nursing assistant is newly awarded such status.

General Counsel argued that rather than showing that Harrison was denied full-time status on grounds other than her union activity, what the above letter demonstrates is that Respondent is applying a different standard for Harrison.

The record supports General Counsel in that regard. Throughout the record, there is evidence that nurses assistants frequently swap out shifts and oftentimes it is necessary for people at the home including Ward Secretary Carol Bishop, to phone other nurses assistants to replace someone that was unable to work their assigned shift. Respondent failed to show that it has taken action against anyone except Harrison, because of an inability to work one or more assignments. Moreover, Respondent failed to show that it has required anyone other than Harrison, to demonstrate an ability to work more than one shift before placing that employee on full-time status.

Even Respondent's November 21, 1990 job posting which resulted in a finding of an 8(a)(5) violation, showed that employees were not being required to demonstrate their ability to work more than one shift before being placed in full-time status. That posting stated:

> Two (2) additional full time Nursing Assistant positions will be filled January 1, 1991. These positions will require that the Nursing Assistant work all three shifts as assigned. Interested Nursing Assistants should apply in writing to me by November 28, 1990.
>
> The employees who are given full time status must work their scheduled hours beginning immediately. If the scheduled hours are not worked, the employee will be returned to part time status and will lose full time benefits and someone else will be changed to full time status.

Under the terms of the posting, employees would be placed in full-time status and then, if they illustrated an inability to work all shift assignments, they would lose their full-time status. Director of Nursing Matthews admitted that she knew of not other instance where Respondent imposed those requirements. However, as to Harrison, Respondent went further. According to Respondent's attorney's letter regarding Harrison, Respondent was requiring her to demonstrate an ability to work all shift assignments before she would receive full-time status.

I find that Respondent failed to prove that Harrison would have been denied full-time status in the absence of her protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

Mary Bess

Mary Bess worked for Respondent on two occasions from June 1987 to March 1988 and from February 1989 until September 1991. During her most recent employment she worked as a full-time nurses assistant.

Bess supported the Union during the 1989 campaign by passing out union leaflets and she was observed in that activity by Supervisor Elizabeth Kinley; she helped employees sign union authorization cards; she had a union meeting at her mother's house; she wore a union button to work the day before the election which was seen by supervisor kinley and she served on the union negotiating committee.

In October 1989, Mary Bess received a warning after she worked four consecutive shifts. The warning dated October 2, 1989, read:

On Friday Sept. 29, 1989 you were scheduled to work 11–7 (Saturday). On Saturday you were scheduled to work a ''double'' 3–11 and 11–7 (Sunday).

When another aide was absent for the 7–3 shift Saturday, you volunteered to fill in for her. The 11–7 supervisor told you that you could not do so, but after she left you stayed and worked the shift anyway and this was insubordination.

During the 7–3 shift a patient in your care complained that you had not given her a bath. You said that you had. The supervisor concluded from the patient's body odor that you had not. You made a false statement to your supervisor.

The same patient also complained that you had ''jerked her around and been mean to her.'' This is patient abuse.

You were directed *not* to work your previously scheduled 11–7 shift Saturday night since your unauthorized working the 7–3 shift on Saturday meant that you would have worked for 24 consecutive hours at the end of the 3–11 shift. You worked the 11–7 shift despite this instruction. This is insubordination.

You have the ability to be an excellent worker, but these problems are unacceptable and must not be repeated. You are suspended for two days. You next report to work on Oct. 15, 1989 at 11 p.m. which is your next scheduled shift.

The purpose of this suspension is to impress upon you the seriousness of your conduct. If there is a repetition you should expect to be discharged.

Sincerely,
/s/ Linda C. McIntyre, R.N.
Director of Nurses

Mary Bess testified that after working the 11 p.m. to 7 a.m. shift she talked to Supervisor Elizabeth Kinley, who was the supervisory nurse on the 11 to 7 shift. After requesting from Kinley that she be permitted to work the next shift in view of Kinley asking for volunteers to work over, Bess told Kinley that she had planned to work a double shift. Kinley, as recalled by Bess, told Bess that Bess should not do that. Later Bess talked with Kinley again and again, Kinley told Bess that she should not work the first shift.

Elizabeth Kinley testified in accord with Bess that on learning that Bess planned to work a double shift beginning at 3 p.m., she told Bess not to work the 7 a.m. to 3 p.m. shift.

Bess left work and went home after the 11 to 7 shift. However, after arriving at home she was phoned by Carol Bishop and asked if she could come in and work the first shift because of a shortage of nurses aides. Bess told Bishop that Kinley had discouraged her working because she planned to work a double shift. Bishop told Bess that if she would come back and work that Bishop would try and get someone else to work the second shift in place of Bess. Bess then returned and worked the first shift.

Although Bess saw Elizabeth Kinley, Kinley did not say anything to her about working the first shift after their previous discussions. However, Bess did overhear a conversation between Kinley and one of her supervisors on the first shift, Carolyn Bryant, in which Kinley told Bryant that she felt Bess should not be working the first shift after having worked the night before. Neither Bryant nor any other supervisor said anything to Bess other than, on one occasion, Pat Freeman asked Bess if she was doing okay being as how she had worked the third shift. Bess told Freeman that she was fine.

Carol Bishop testified that on occasions when Respondent anticipated nurse assistant shortage on a particular shift, it was Bishop's job to phone potentially available assistants to fill in the shortage. There does not appear to be a dispute regarding the practice of Carol Bishop phoning other nurses aides when it was necessary to replace an aide that was unable to work their regular shift. Emma Jean Ford, who is a nurses aide and has worked for Respondent for 17 years testified to that practice.

It was in that capacity that Carol Bishop phoned Mary Bess, a nurses assistant, and asked Mary Bess to come in and fill in during the 7 to 3 shift. Bishop called Bess because some of the assistants did not report for work.

Bess agreed but pointed out to Bishop that she was also scheduled to work the 3 to 11 shift that day. Bishop told Bess that she would try and have someone else come in and fill in on a later shift if Bess could come back in to relieve the immediate shortage.

Bishop went to the supervisor, Pat Freeman, and told her that Mary Bess had agreed to come in for the 7 to 11 shift.

According to Bishop, it was routine for her to be advised by memo, note or comment, if there were employees that should not be contacted. On this particular day she was not advised to not phone anyone. In particular Bishop was never told that she should not contact Mary Bess to fill in the 7 to 11 shift. Moreover, according to Bishop, she had never been told that employees were limited as to working straight shifts. She was not restricted in her searches for fill-in employees by whether the particular employee had worked the previous shift or whether the particular employee was, as Mary Bess on this occasion, scheduled to work the next following shift.

As Mary Bess neared completion of the evening shift, she learned that two assistants scheduled for the next shift including Cindy Dubose who had been lined up by Carol Bishop to work that shift and release Bess, were not going to report. Bess testified that in accordance with Respondent's policy it was necessary for her to work the remaining shift because her planned replacement did not show up for work. Consequently Mary Bess worked 32 consecutive hours.

On that same day during the 7 to 3 shift, Bishop overheard Supervisor Pat Freeman ask Mary Bess about (a patient).[1] Freeman told Bess that she believed Bess had already bathed (the patient) but since (the patient) was complaining that she had not had a bath, would Bess bath (the patient) again. Bess agreed that she would give (patient) another bath.

Bishop described (the patient) as being in her late 80s or early 90s and somewhat peculiar in that she frequently insisted on a particular assistant, Lula Byrd, and she insisted on not having new linen on her bed.

Mary Bess testified regarding the incident involving the patient's complaints about not having a bath. The nurse that

[1] During the hearing Respondent requested that the names of patients be omitted. Even though patients were, on occasion, named during the hearing, I have deleted patients' names whenever I could conveniently do so without injury to the substance of the decision.

was the supervisor on that shift Pat Freeman asked if Bess had bathed a patient that was complaining about not having had her bath. Bess explained that she had already given the patient a whirlpool but, on request of Pat Freeman, Bess subsequently gave that patient another whirlpool.

Later that afternoon Pat Freeman again came to Mary Bess and said the same patient was complaining that she had not as yet had her bath. On that third occasion Pat Freeman accompanied Bess in giving the patient another whirlpool. During the whirlpool Freeman had another assistant, Nancy Hamm, replace Bess in order to permit Bess to go to lunch. After lunch Bess returned and as she entered the whirlpool Supervisor Pat Freeman told her that the patient did not even realize the change when Nancy Hamm came in and that she knew the patient was confused.

Mary Bess testified that that particular patient complains when she does not have her regular aide and, since Bess was working an abnormal shift for her, she was not that patient's regular aide.

In defense Respondent called Patricia Freeman who was assistant director of nurses. Freeman agreed with the testimony of Bess except Freeman testified that after the patient complained to her on the second occasion, she was close enough to notice that the patient smelled sour. From that Freeman felt that the patient had not had a bath that day even though Bess claimed that she had bathed the patient twice.

Although, according to Bess, she was giving the patient a third whirlpool pursuant to Freeman's direction, Freeman heard the patient calling. When she went into the whirlpool room the patient was in the lift over the tub, caked with powder, wet but with her gown hanging over her head. At that point Freeman assigned another nurses aide with directions to rinse, dry, and dress the patient. She instructed Bess to go to her meal and she wrote up the incident regarding the patient's complaints and her observations.

On October 3, Bess was called into the office of Linda McIntyre and given a written warning in a sealed envelop. McIntyre did not question Bess about any of the incidents included in the warning, nor did she offer any explanation about the warning.

After her suspension, Mary Bess was phoned by Director of Nurses McIntyre and asked to fill in as assistant. Bess reminded McIntyre of her suspension and McIntyre said she had forgotten.

Findings

I was impressed with the demeanor of Elizabeth Kinley and Patricia Freeman. Both appeared responsive in their answers to questions from opposing counsel.

Moreover, as to the issue of Mary Bess working four consecutive shifts despite being told not to work the second consecutive shift by Supervisor Kinley, the evidence is not in dispute. Regardless of Bess being phoned by nonsupervisor Carol Bishop and asked to work the second consecutive shift, Bess had been told before that call not to work the shift. Bess did so without clearing up the question of contrary instructions from Supervisor Kinley. In view of that evidence I am persuaded that Respondent would have disciplined Bess in the absence of her protected activity. *Wright Line*, supra; *NLRB v. Transportation Management Corp*., supra; *Delta Gas*, supra; *Southwire Co. v. NLRB*, supra; *Yaohan of California*, supra.

As to the incident regarding the patient and the whirlpool, as shown above, I credit the testimony of Patricia Freeman. The evidence illustrates that Freeman had a reasonable basis for believing that the patient in question had not been bathed despite assertions to the contrary from Bess. Here, too, I am convinced that Bess would have been disciplined in the absence of protected activity. *Wright Line*, supra; *NLRB v. Transportation Management Corp*., supra; *Delta Gas*, supra; *Southwire Co. v. NLRB*, supra; *Yaohan of California*, supra.

The record does not support the allegations that Bess engaged in patient abuse. As shown in this decision, it was not uncommon for patients to complain about abuse. Customarily, as shown, Respondent did not take action based solely on a patient complaint.

Despite my finding as to the patient abuse question, that appears almost as an afterthought in Respondent's action against Bess. I am convinced that the same punishment would have resulted against Bess absent the patient abuse allegations. Therefore, I am unable to find a violation in that regard.

Suspended and Discharged Robert Dargan

General Counsel contends that although Respondent allegedly suspended then discharged Robert Dargan for patient abuse, Dargan was actually suspended and discharged because of his union and protected concerted activities.

Dargan worked for Respondent for 10 years and 8 months. He was an orderly.

Dargan testified that he was the only orderly that supported the Union. Dargan signed a union authorization card, attended meetings, and wore a union button at work. Like Carol Bishop and 24 other employees, Robert Dargan signed the June 15, 1989 letter to Respondent's administrator advising of the union organizing campaign.

Additionally as shown below, on June 22, 1990, Dargan joined with other employees in signing a letter to the director of nurses complaining of what they felt were racist activities of a supervisor.

In regard to the patient Dargan was accused of abusing, Dargan admitted that he cared for that particular patient for 3 or 4 years. After the patient's wife died, the patient's condition worsened and he was transferred to Respondent's infirmary. Dargan took care of the patient's health care, he washed him, dressed him, combed his hair, placed him in a chair, and fed him each day. Dargan estimated that he spend 5 hours a day with that patient.

That patient had what Dargan and others described as bad days. Occasionally the patient, who was formerly a preacher, would say that he had to go to Charleston to preach. Occasionally the patient had to be restrained for his own protection.

On one occasion before his suspension, Dargan was told by Director of Nurses McIntyre that the patient had accused Dargan of abusing him. In a prehearing affidavit Dargan recalled that occasion was in March 1990 but he testified that he could have been mistaken on the date.

Linda McIntyre testified that incident occurred on May 11, 1990, when a patient complained to her that Robert Dargan had hit him five times over a period of 3 months, and that Dargan had threatened to hurt him. McIntyre interviewed

Dargan about that complaint on May 11, 1990. Dargan told her that he had not hit the patient. McIntyre told Dargan that she believed him but that he would be terminated if she discovered that he was abusing a patient.

Kay Matthews testified that while she was assistant director of nurses on March 27, she was involved in an incident during which Robert Dargan told her that the patient had told him to leave the room. Dargan and Matthews went into the patient's room and found the patient had spilled milk. While Dargan was out of the room the patient told Matthews in response to her question of why he would not let Dargan help him, ''[h]e hits me . . . he pushes me, he yells at me.''

On June 27, 1990, Dargan was again confronted by McIntyre with a report that the same patient had complained to Nurse Shirley Young. Young submitted the following report to McIntyre:

> 6–26–90
>
> At approximately 2 pm today I was working on charts at the nurses station on Norris Wing along with our ward clerk Carol. When [the patient], a pt. who resides in #44 came up via pushing himself—he motioned to me to come over to where he was. He then told me that the restrainer that was around him was too tight—I proceeded to loosen the tie restraining device which was tied around him and also around the back of the wheelchair the restrainer was indeed too tight in my opinion. The following conversation took place at this time between my self and [the patient]—He then said to me the orderly Robert was a very mean person who treated him very badly. He said that he was working on some things in his room when the orderly came in and ''put this thing around me and pushed me out into the hall'' which was apparently against his wishes. I asked him if he wanted to go back and he replied yes. He also proceeded to tell me that in the past he had been hit on the head and slapped in the face by this person. I asked him if he had been hit recently to which he said no but he was treated very badly by this person every day. I then asked him to repeat these things to the ward secretary.
>
> [The patient] hesitated saying that he would prefer not to create a fuss as he was afraid the orderly would beat him up. I told him we would not allow this to happen. He then repeated some of the things he had said to the ward secretary. I reassured him that I would take care of things. I then pushed him back to his room as he had wanted earlier. A short time later he returned to desk, he then told me ''as an example of how this man operates I was in my room earlier looking through some things in my closet when the orderly came in and asked me what I was doing. He then told me that the closet was not mine but belonged to him and to get away from his things. He then pushed my chair away from closet and into hall. (He then said that he had studied peoples characters for many years as a minister and that he [the orderly] was a dangerous man.) I then asked [the patient] if he was afraid of Robert and he replied yes he was. I feel that [the patient] knew exactly what he was saying during our conversations. [The patient] has appeared completely orientated, coherent and without confusion at all times when in my presence today. I reported what I have written to Pat Freeman RN who instructed me to write these notes and return to Mrs. McIntyre RN. I would like to add that this is a situation which I think should be corrected as soon as possible.
>
> /s/ Shirley Young LPN

When McIntyre confronted Dargan, Dargan told McIntyre that he had not abused the patient.

After hearing the report from Shirley Young, McIntyre wrote an account of her meeting with Dargan:

> I told Mr. Dargan about the complaints from [the patient] yesterday and the fact that the waist restraint was to [sic] tight according to [the patient] and Mrs. Young. I also told Mr. Dargan that [the patient] had been mean to him by saying that [the patient]'s closet belonged to him [Mr. Dargan] and that [the patient] must stay out of it. I told Mr. Dargan that in view of past reports and this most recent report that I must ask him to explain. Mr. Dargan said ''I haven't touched him since we talked last time.'' I ask if that meant that he had hit him before and he said no. He stated that the waist restraint was probably to [sic] tight but he was told never to have [the patient] in the wheelchair without it. He said he wouldn't hit [the patient] or anyone because it wasn't a matter of just losing a job that you could go to jail and ''Nobody white is worth going to jail for.'' Ms. Bishop then stated that Ms. Young called her into the smoke room and told her that she didn't want Ms. Bishop to think that she was trying to get Mr. Dargan in trouble. They [Ms Young and Ms Bishop] took [the patient] into an empty room and Ms. Young questioned him in Ms. Bishop's presence. Ms. Bishop stated that [the patient] wanted authority. At this point I called Ms. Young into my office and she seemed to tell a similar story. I ask her if [the patient] appeared to be frightened when talking in front of Ms. Bishop and she said no. At this point I told Mr. Dargan that in view of all the reports of verbal and/or physical abuse that I was suspending him indefinitely. He ask for how long and I told him until he hears from me.

Dargan testified that he never did abuse his patient. Occasionally it was necessary to use force necessary to restrain the patient and Dargan admitted that on one occasion when the patient threatened to hit Dargan with his cane, Dargan told him that if he hit him with the cane he would hit the patient. Dargan testified that he was not seriously threatening the patient but was attempting to calm the patient and that the patient did in fact, calm down.

Lisa McPhail testified that the patient frequently asked for Robert Dargan and told others that Dargan understood his needs. McPhail testified that Dargan exercised good practices when dealing with the patient and did not abuse him to her knowledge.

McPhail testified that that patient did frequently complain about nurses assistants without just cause.

Dargan along with 14 other employees signed a June 22, 1990 letter to Director of Nurses McIntyre under the signature of Carol K. Bishop. The letter stated:

> For the last few years I have been humiliated and embarrassed by a staff member of Bethea Home. Each time I utilized the telephones, staff member Ms. Sadie Stewart take an alcohol cloth and clean the mouth piece of the phone.
>
> I feel very strongly that this is done because of my race Black. I respectfully request that this kind of discrimination cease to exist immediately.

Around June 27, 1990, Dargan was called in and told by Director of Nurses McIntyre, that Nurse Shirley Young had accused him of abusing the patient. Dargan denied ever abusing the patient and offered to take a lie detector test. McIntyre told him that she wanted him off the property. Dargan was suspended.

Subsequently Dargan received a letter from Respondent dated June 27, 1990, which stated:

> For the reasons that we discussed I find that it is necessary to terminate you from Bethea Baptist Home.
>
> Sincerely,
> /s/ Linda C. McIntyre, R.N.

Shirley Murray testified that she was with Robert Dargan while he restrained the patient on June 26 and that Dargan did not abuse the patient. Moreover, Murray testified that she overheard several segments of a conversation in which Shirley Young questioned the patient as to whether he had been hit by Robert Dargan. According to Murray, Young was unaware that Murray could overhear the conversation between Young and the patient. Murray testified that the only response the patient made to Young's questions was that Robert Dargan wanted authority.

Murray testified that Robert Dargan was a good employee and that he had a good relationship with the patient. Murray testified that the patient never complained about Robert Dargan to her even though she worked with the patient every day. Murray never did see any bruises or other indications that the patient had been abused.

Carol Bishop testified to an incident that involved the patient, who was 85 to 90 years old, and LPN Shirley Young. Shirley Young wheeled the patient near Bishop and told the patient to tell Carol Bishop what the patient had told her. Young asked the patient if Robert Dargan had slapped him and, as she asked the question, Young slapped the patient on the side of his head. The patient replied that he wanted to go back to his room and work on his papers. Young repeated to the patient that he should tell Bishop what he told her but the patient never responded to those requests.

Carol Bishop testified that she was again involved in the matter regarding Shirley Young and the patient the next day. Bishop was questioned by Director of Nurses McIntyre in the presence of Shirley Young, as to her conversation with Young and the patient regarding whether the patient had been abused. Bishop told McIntyre that the patient did not say that he had been abused.

Later that day Carol Bishop was again called into a room by Shirley Young and Young again questioned the patient, slapping the patient to emphasis her questions as to whether he had been abused. Bishop finally asked Young what it was she was trying to have the patient say. Young again asked the patient if Robert had abused him but the only response Bishop heard from the patient was that Robert wants authority. During that conversation, Bishop was paged to director of nurses office.

Carol Bishop testified about what occurred in McIntyre's office:

> When I went there, McIntyre and Reverend Yarbrough was there. She paged Robert. Robert did not come in immediately so she walked outside to page him again. A few seconds after that, Robert and Ms. McIntyre came into the office. She said to Robert that it had been reported that he had abused [patient] and that she was going to suspend him. And, I immediately said to her that I had just spoke with Mrs. Young and [patient] did not say that Robert abused him. And, she immediately stopped and asked me when and I said that's where I was when you paged me. And, I explained to her what Shirley Young had asked [patient] in my presence and she then paged for Shirley Young to come. And, she asked Shirley about the incident that I had mentioned to her to confirm what I was saying and Shirley responded by saying yes, I did tell this to Carol because I didn't want her to think that, you know, I was a dirty person, two faced or something like that. Anyway when Shirley did tell her that we had the conversation, she said, Robert you're still suspended and Robert said, for how long. She said maybe till the end of the day, maybe a week, maybe a month, and we left.

Carol Bishop testified that the patient involved was oftentimes confused. Occasionally he required restraint to a wheelchair. The patient could not feed, clean, or shave himself and it was up to the assigned orderly, oftentimes Robert Dargan, to perform those functions, as well as dress the patient.

Emma Jean Ford, who has worked for Respondent for 17 years as a nurses aide, testified that the particular patient involved in these incidents was frequently abusive to employees. Ford testified that occasionally that patient would either threaten to hit or, on occasion, actually hit or attempt to hit employees with his cane. Ford testified that she observed that patient and Robert Dargan. According to Ford, Dargan frequently assisted that particular patient and the patient would ask for Dargan. Ford recalled that Dargan used considerable care and compassion in assisting that particular patient who was in his late 80s.

Ford testified that she never did observe Dargan abuse the patient.

Carolyn McPhail testified that she was familiar with Robert Dargan's work with the patient in question and that Dargan exercised care in working with that patient. McPhail described the patient as one of having both good and bad days and that on occasion the patient would try and fight the employees and would have to be restrained.

On cross-examination, Kay Matthews who became director of nurses on October 1, 1990, admitted that she has received allegations of patient abuse by Nurses Assistant Desi Lewis from Pat Thornton, an LPN. Desi Lewis remains employed by Respondent. Matthews admitted that Desi Lewis is engaged to marry the dietary supervisor's son but Matthews denied knowing that Desi Lewis is opposed to the Union.

Respondent in defense of the allegations regarding Dargan, called LPN Shirley Young. Although Young agreed that the elderly patient at issue was very hard of hearing, her testimony in other regards as to the patient and his relationship with Robert Dargan disagreed with the testimony of other witnesses.

According to Young's testimony, after she started working for Respondent in April or May 1990, she frequently observed the patient and Robert Dargan. Young's testimony was that the patient was very cooperative but that the patient feared Dargan and was uncooperative with Dargan especially when Dargan bathed the patient.

Young testified that while she was working at a desk with Carol Bishop the patient wheeled himself up in his wheelchair and asked to speak to someone in authority. According to Young, the patient told her that Robert Dargan was dangerous; that Dargan had hit him on his head; had slapped his face and the patient said that he had been studying people's characters for 40 years and that Dargan was a dangerous character. Young testified that the patient went on to tell her that while he was going through his things in the closet in his room, Dargan came in and told him those were not his things and Dargan pushed him out into the hall.

Young admitted that when she asked Carol Bishop if Bishop had heard what the patient had said that Bishop told her she had not. Young then tried without success to have the patient repeat for Carol Bishop what he had said about Dargan. Young denied that she slapped the patient while asking him if Dargan had hit or slapped him.

Young asked the patient if he would like to go back to what he had been doing. The patient replied that he did and Young pushed him back to the closet in his room.

Shirley Young reported the incident to Assistant Director of Nurses Freeman who told her to write the incident up. That night at home, Young wrote up a report on what she had been told by the patient. She turned in the report to the director of nurses.

On cross-examination, Young admitted that she had never seen Robert Dargan abuse the patient and Young admitted that the patient was occasionally confused.

Subsequently, Young was called into the director's office. Robert Dargan, Carol Bishop, Dee Auger, and McIntyre were present. McIntyre told Young that Carol Bishop said that she did not hear the patient say what Young claimed in her report. McIntyre asked Young, ''do you stand by what you wrote?'' Young replied, ''word for word.''

Young testified that before that incident she had observed the patient alone in his room with his food tray where he could not reach it, the patient would be trying to get the food and would have food all over him. Young said she had no idea where Robert Dargan was. According to Young, Dargan seldom spent time with the patient.

Findings

As shown above, I found that I could not credit disputed testimony of Shirley Young and Linda McIntyre.

As to the suspension and discharge of Robert Dargan, the record appears to support a prima facie case of discriminatory action.

One patient complained on occasion that he had been hit by orderly Robert Dargan.

On March 27, 1990, that patient told Assistant Director of Nurses Kay Matthews that Robert Dargan hits, pushes, and yells at him. Nevertheless the record showed that Dargan was not disciplined for that incident. According to the unrebutted testimony of Dargan, the question of whether he had abused the patient occurred on only two occasions and on the second of those two occasions he was suspended then fired.

The first occasion on which Dargan was confronted with claims by the patient that he was abused by Dargan evidently occurred on May 11, 1990. Although Dargan recalled March as the date, he testified that he could be mistaken and, in fact, the records show it happened in May. On that occasion Director of Nurses McIntyre told Dargan that she believed his claim that he had not abused the patient despite the fact that the patient had complained directly to McIntyre that Dargan had hit him five times over a period of 3 months.

During the following month, on June 22, Dargan joined with 14 other employees in signing a written complaint submitted to Respondent, alleging racist actions by Nurse Supervisor Sadie Stewart.

Five days after the June 22 letter, another nurse told Director McIntyre that the same patient that had complained to McIntyre in May, had made the same complaint to her. Additionally, that nurse, Shirley Young, added that the patient made an additional complaint that Dargan had restrained him in his wheelchair and pushed him out of his room into the hall.

It was allegedly on the basis of that report that McIntyre decided to discharge Dargan. However, the evidence shows that McIntyre was aware of other evidence which called the accuracy of Young's report into question. Carol Bishop who was present during the first occasion the patient talked with Young, told McIntyre that she did not hear the patients make the claims attributed to him by Young and both Young and Bishop agreed that on a second occasion when Young asked the patient to confirm to Bishop what he had allegedly said to Young about Dargan, the patient refused to do so.

Moreover, as was the case in March and May, there was no evidence of patient abuse other than the word of the patient and the patient was known to be confused on occasion.

As to the claims of the patient, the claims that he was hit by Dargan on several occasions are, of course, serious. However, that patient made those claims to Kay Matthews in March and no action was taken; and that patient made those claims to Linda McIntyre in May and McIntyre told Dargan that she believed his denials. The complaints allegedly made to Shirley Young apparently involved the same claims of being hit by Dargan that the patient had made to McIntyre. Shirley Young in her written report stated that the patient claimed that in the past he had been hit by Dargan. In the note she made shortly after she talked with the patient Shirley Young wrote:

> I asked [the patient] if he had been hit recently to which he said no

Respondent offered no evidence as to why it elected to discharge Dargan in June even though no additional claim had been made of abuse other than an indication that the patient's wheelchair restraint was ''too tight,'' and the patient

claimed that Dargan had told him that the patient's room closet was not the patient's but belonged to Dargan.

In contrast to the treatment of Dargan, General Counsel pointed to the admission of Director of Nursing Kay Matthews that she has received reports of patient abuse by Nurses Assistant Desi Lewis but that Lewis has not been discharged. Matthews testified that she did not know if Lewis opposed the Union even though Lewis is engaged to marry the dietary supervisor's son. That evidence shows, at the least, that Matthews, unlike the case of Dargan, was unaware that Lewis supported the Union. There was no evidence showing that Desi Lewis was ever involved in any protected activity.

In view of the above record evidence, I find that General Counsel proved a prima facie case that Robert Dargan was suspended then discharged, because of activities protected under the provisions of the Act. I am especially impressed by the fact that Respondent knew of the patients allegations that Dargan hit him as early as March and May, but told Dargan that they believed him when he denied the patient's allegations. However, a few days after Dargan joined other employees in complaining about a supervisor's allegedly racist activity, Dargan was discharged when the same patient made essentially the same claims. By signing that letter along with several other employees, Dargan was engaged in protected concerted activities.

The record illustrated that Respondent did not show that Dargan would have been suspended or discharged in the absence of his protected activities. As shown above, Respondent waited until after Dargan engaged in protected activities on June 22 before suspending him on June 27 even though it knew about the allegations of physical abuse over a month earlier. Dargan's June 22 concerted activity followed his overt union activities during the union organizing campaign. The record showed that Respondent knew of Dargan's union activities. In fact he was one of the employees that signed the letter that gave Respondent its first knowledge of the union organizing drive. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Yaohan of California*, 280 NLRB 268 (1986).

The 8(a)(5) allegations

Negotiated in Bad Faith Since September 26, 1989

General Counsel contends that Respondent engaged in bad-faith bargaining with the intent of avoiding agreement. General Counsel argued that Respondent's intent was demonstrated by evidence showing that Respondent during negotiations refused to agree to union proposals other than matters of no substantive effect and other matters which it already had a legal obligation to perform; by evidence showing that its spokesperson stated that Respondent intended to leave employees with no more, and perhaps, with less, than they had before the Union; and by Respondent's insistence during negotiations on contract provisions which would deprive employees of legal rights.

The parties met in negotiating sessions on September 6 and 29, 1989; October 20, 1989; November 2 and 21, 1989; December 12, 1989; January 18, 1990; February 6 and 23, 1990; March 7, 1990; June 20, 1990; November 8 and 21, 1990; December 18, 1990; and February 14, 1991. Additionally, on dates specified below the parties exchanged relevant letters.

September 6, 1989

Business Agent Eileen Hanson testified that the Union and Respondent have had 14 bargaining sessions beginning on September 6, 1989. During that session, the Union presented a contract proposal to Respondent. Prior to that session the Union had received from Respondent pursuant to the Union's request, a packet showing various policies of Respondent.

Hanson testified that the discussion during that first session included Respondent admitting that some policies were not contained in written documents. Some of those policies were communicated to the employees including some that were probably communicated to employees only on a need-to-know basis. Hanson gave as an example Respondent's attorney Gignilliat's comments that the policy regarding jury leave may not have been communicated unless a particular employee informed Respondent he or she had been selected for jury duty.

Respondent at the first bargaining session, asked the Union to appoint temporary stewards and, after a caucus, the Union informed Respondent's representatives that the members of the negotiating committee would act as temporary stewards. Gignilliat informed the Union that he would prepare a contract proposal for Respondent to submit to the Union and that he would be sending his proposal to Respondent's executive committee of their board of directors. He felt that would take about 3 weeks.

The Union questioned Gignilliat about one of the printed policies regarding investigation before taking disciplinary actions against an employee. Gignilliat admitted that policy had not been followed in a situation involving Zamanda Harrell. In that regard, Gignilliat told the Union, ''We gave you our policies, but we didn't say we followed them.''

September 29, 1989

The next negotiating session occurred on September 29, 1989. Before the session, the Union received a contract proposal from Respondent.

Also, before the bargaining session Respondent advised the Union of their intent to institute a retirement plan for nonbargaining unit employees beginning October 1, 1989, and the Union was asked if they wished to have unit employees included in that plan. The Union agreed that they would like to have unit employees included in the retirement plan. At the bargaining session the Union asked to be provided with information regarding the retirement plan. That was subsequently provided by Respondent.

Respondent provided the Union with job descriptions which had been requested by the Union. Respondent's attorney explained that the job descriptions may not be accurate as to current practices.

During the meeting, the Union went over Respondent's contract proposal and asked questions regarding the proposal.

Among the matters discussed was whether employees would be classified as full or part time and it was Respondent's position that only those employees scheduled for 80 hours' work in a 2-week period would be considered full-

time employees. Respondent also took the position that they would prefer to pay the employees on a 2-week basis rather than the current policy of paying on a weekly basis.

October 2, 1989

Respondent furnished the Union materials the Union had requested on the issues of sick leave and retirement. The Union informed Respondent that it had decided to oppose immediate implementation of timeclocks. That had been a previous matter of discussion. Respondent's took the position that even though it did not use timeclocks it reserved the right to install timeclocks. The Union was responding to a question of whether Respondent could implement use of timeclocks during negotiations.

The parties discussed several issues under the contract proposals. Respondent opposed including job descriptions in the contract. Respondent's position was that job descriptions in the contract would limit their current practice of having the employees perform all duties assigned at the beginning of the shift.

Hanson testified that Respondent's chief spokesperson, their attorney, said that Respondent came to the table wanting to give the Union as few rights as possible in negotiations.

Respondent's position on contract duration was to limit any contract to 1 year because the budget was approved by the directors each year. Respondent disagreed with the Union's proposed grievance procedure including arbitration. Respondent proposed a two-step procedure with the administrator having the final say in any grievance.

November 2, 1989

Respondent gave the Union some information the Union had requested regarding an annuity program. Respondent agreed that stewards could use holidays or vacation time for a steward training program scheduled in December.

Respondent presented the Union with a counterproposal as to the Union's proposed contract provisions regarding ''Stewards,'' and ''Grievance Procedure.''

The Union objected to a letter Respondent had sent the residents alleging that negotiations had been slowed because of absence of the Union's negotiator. The Union pointed out that Eileen Hanson had full negotiating authority and that she had been present even though Davis had been out with a broken arm. On cross-examination, Hanson agreed that her notes reflected that Respondent was told by the Union that as of that meeting Hanson has full authority to negotiate.

As to a union proposal that the contract provide that employee may look at their own personnel files, Respondent replied that was subject to abuse and that the negotiators would advise Respondent to permit employees to see their own files but that they did not want to include that in the collective-bargaining agreement.

The Union's request for visitation rights at the home was rejected by Respondent on the grounds it upset the residents. The Union pointed out there were already many visitors at the home and that the Union would not be disruptive and would not visit the residents but only unit employees. Respondent continued to oppose visitation rights for the Union.

The parties discussed Respondent's contract proposal item by item. Among other things Respondent agreed to amend its definition of full-time employee from an employee that is scheduled to work 80 hours during a 2-week period to an employee that is scheduled to work 75 hours during a 2-week period. The practice was for employees to normally work 37-1/2 hours each week.

November 21, 1989

The Union presented a proposed management-rights clause.

The Union presented a handwritten proposed grievance procedure provision which included a step three and a provision for resolution in the event the grievance was not resolved at step three. Respondent said they did not want the grievance procedure to go beyond step two which involved final determination by the home's administrator.

December 12, 1989

The parties went over the Union's proposed contract item by item. Respondent presented a package proposal involving acceptance of the union dues check off in exchange for the Union agreeing to incorporation of Respondent's proposed provisions on management rights, employment at will, and employment integrity. Respondent refused to agree to union proposals including continuation of free meals in view of the upcoming increase in the minimum wage by law, Respondent was considering charging for meals; although the Union indicated a willingness to agree to the current probationary period of 60 days, Respondent would not agree indicating they may want to increase it to 90 days; Respondent said they wanted to increase the number of part-time employees and decrease full-time employees and that they did not want to agree to firm rules for determining part as opposed to full time but wanted that determination left to the discretion of the administrator; Respondent opposed permitting job bidding for vacant jobs on seniority as not being consistent with their desire for employment at will; Respondent would not agree to include anything in the contract which would entitle the Union to seniority lists after negotiations concluded; and Respondent continued to oppose any visitation rights by union officials. Respondent continued to oppose inclusion of job descriptions; and they opposed inclusion of provisions for union bulletin boards or rights to posting of notices on other bulletin boards.

January 18, 1990

Respondent provided a proposed grievance procedure and, in addition to its earlier two step proposals, stated its willingness to include a paragraph stating that the Union could send a 10-day letter to Respondent and Federal Mediation of the existence of a labor dispute in the event the grievance was not resolved by the determination of the administrator (Respondent's proposed second step).

Respondent told the Union they would have some revisions in their previous positions on leave of absence. Although the current policy was for Respondent not to force an employee out for sickness that had used all his or her sick leave, to be permitted to continue out without pay but not to be forced to use unused vacation time, Respondent expressed a desire to change that so that it could force the exhaustion of all vacation time before permitting an employee to go on sick leave without pay.

As to meals and breaks, Respondent opposed inclusion of a break period provision even though it indicated a willingness to grant breaks at its discretion and Respondent said it would probably discontinue its free lunch policy whenever the new minimum wage law went into effect.

The Union asked if Respondent had given a raise to anyone in the bargaining unit and Respondent replied no. The Union said they would propose a wage increase for unit employees for 1990 during the next negotiating session. Respondent said they would agree only as part of the entire contract but that they were willing to discuss the matter during the next session.

February 6, 1990

The Union asked that the employees be given a wage increase effective January 1990 on the basis of past practice. Some of Respondent's negotiating team admitted that it was their practice to grant annual increases each January. Their attorney said Respondent had presented the Union with a contract proposal in September and that that proposal contained a wage increase.

Respondent agreed to include in its grievance procedure proposal that stewards could attend disciplinary meetings and that employees would be required to sign disciplinary writings. Respondent gave the Union new proposals regarding discipline and vacations.

Respondent stated it intended to include its rights to take disciplinary action for actions of an employee off the job. As an example they wanted the right to discipline someone that was abusive to their parent.

February 23, 1990

There was discussion regarding some new hires by Respondent at the rate of $4 per hour. The parties discussed and Respondent explained its position on employment at will which was explained to exclude anything that would constitute a violation of Federal law but that Respondent wanted to reserve the right to discharge at will. The Union asked about the employee integrity clause and Respondent's past explanation of its desire to include employee surveillance measures. The Union asked why they wanted this now in view of the fact those measures had not been taken in the past. Respondent said they had had the right to do that in the past but the law said these matters must be negotiated and Respondent wanted to have these rights included in the contract or in a side letter.

The management-rights proposal of Respondent was again discussed and particularly Respondent's desire for the right to discipline employees for off-work activities. Respondent explained that they wanted the right to discipline someone even if that person was found not guilty of the allegations, in a court of law. Respondent also contended they wanted the right to take action against an employee if a patient complained about the employee even if the patient was confused and the patient's accusation was false.

Respondent's attorney, its chief spokesperson, stated he would not be surprised if it did not get something similar to employment at will in the contract and he would be surprised if the Union was able to get arbitration. The following testimony is included in the testimony by Eileen Hanson:

> [Union spokesperson] Mr. Day said that the Union was not going to give up the right that they had to represent people and to have a redress of grievances. That we were here to negotiate a contract and we thought that they should have the right to have an unbiased viewpoint, such as a third party. Referring to arbitration.
>
> Mr. Gignilliat said, ''Is that your firm position?''
>
> Mr. Day said, ''We may have an impasse here.''
>
> Mr. Gignilliat said, ''We gave the Union a complete proposal for a contract, including a wage proposal.''
>
> Mr. Day said that the minimum wage was going up April 1st and we wanted to know how they were going to—how that was going to impact on the wage proposal.
>
> Again, Mr. Gignilliat said that they did not want to have a third party involved in settling grievances. And Mr. Day said he thought that the Company was holding the issue of the Union dues as ransom in order for them to get a Management Rights clause and that we weren't interested in that. We weren't interested in the Management Rights clause that took away employee protections.

March 7, 1990

Julian Gignilliat, Respondent's attorney and chief negotiation spokesperson, testified that although there were no negotiating sessions between February 23 and June 20, 1990, in which the full negotiating committees were present, there was a negotiating session on March 7 when he met with Union Agents Ed Davis and Dave Day. That meeting was confirmed by Gignilliat's letter to the Union which is discussed under the following topic.

It was Gignilliat's understanding that after the March 7 meeting during which the parties discussed the entire contract, that seven issues remained in dispute. The parties had reached tentative agreement on all other issues.

A meeting was scheduled for April but, according to the testimony of Julian Gignilliat, that meeting was postponed because of the Union's request based on their involvement in a dispute with Kroger.

March 9, 1990

By letter dated March 9, Respondent's attorney wrote the Union and enclosed a copy of a proposed contract. The letter indicated it was the attorney's understanding there were seven areas of disagreement and that he understood the Union was willing to recommend ratification of a contract which was largely composed of Bethea's present proposals.

June 20, 1990

Hanson testified in a prehearing affidavit:

> I do not think anything was scheduled for April. [Union negotiator] Day was involved in Kroger negotiations in April and May. A meeting was scheduled June 1st but, the union cancelled due to a strike at Kroger possibility, it was re-scheduled for June 20.

There was discussion about two grievances. Respondent and the Union discussed the issue of leaves of absence and whether an employee would be guarantee his or her old job

on return. Respondent took the position the employee could return to the former job if that job was vacant.

During the meeting the Union presented Respondent with a written proposal to pay all employees a minimum of $4 an hour in view of Respondent having recently hired employees at that rate.

August 3, 1990

On August 3, Respondent's attorney wrote the Union advising that he had received a letter from an attorney representing some of Respondent's employees in a civil suit, which included a proposal to settle the civil suit and to resolve the collective-bargaining dispute with an agreed-on contract. The letter asked the Union if that lawyer's letter represent the Union's best offer to resolve the collective-bargaining contract issues.

August 9, 1990

On August 9, the Union responded to Respondent's August 3 letter stating that the attorney's letter did in fact represent the Union's best offer.

September 13, 1990

On September 13, Respondent's attorney wrote the Union:

> This is to confirm our earlier conversation regarding the status of negotiations at Bethea. I have absolutely no doubt that we are at an impasse. Frankly, I think that we have been there since February, but it is crystal clear now.
>
> We are quite willing to have a contract with the UFCW. You have our terms. They are still available to you. I hope that the union will agree to these proposals so that we can begin to build the teamwork and cooperative spirit which is in the mutual best interest of your members and my client.
>
> Whether we have an agreement or not, or prior to entering into one, there are certain changes and conditions which we have proposed to the union and which we have now decided to put into effect. The first of these is to go to a bi-weekly pay day. This is a change which had been planned last summer but which was shelved because of the election petition. I enclose a memo to employees which explains the details of the change.
>
> We are ''moving forward'' with the purchase of time clocks, which is another change planned prior to the petition being filed. I do not know when the clock(s) will be purchased, but it should be soon. This, too, I think is in the mutual interest of the employees and Bethea.
>
> The perfect attendance bonus day off is eliminated effective immediately.
>
> Effective October 1, we will begin paying sick leave on the second and subsequent consecutive days of each absence because of sickness and we may require a physician's statement before making sick leave payments.
>
> Effective October 1, 1990, employees must regularly work five days (37 1/2 hours) per week or ten days/75 hours biweekly to be eligible for full time status and full time employee benefits. The immediate significance of this change is that Bethea will no longer pay for health insurance coverage of a small number (a half dozen or less) of employees who presently work only 4 days a week (30 hours). These employees will still have whatever remains of their sick leave and vacation from its accrual January 1, 1990, but will not earn additional sick leave and vacation on January 1, 1991. Nor will they be eligible for holidays after October 1, 1990. If these employees wish, we will attempt to maintain their full time status by offering them an additional day of work each week, although not necessarily on the same shift or in the exact same job.
>
> We are investigating the purchase of video cameras, etc., but will notify you before they are installed, assuming that a decision is made to install them.
>
> We are in the process of revision work rules, but will send you a copy before they are announced to the employees.
>
> I hope to discuss our contract proposals with the new administrator before he actually takes over at Bethea. Although he will have no authority to change our proposals (that is now the prerogative of the Executive Committee), he may very well want to institute other changes consistent with our proposals. In such event, I will notify you.
>
> If you have any questions, please call me.
>
> With best personal regards and good wishes, I remain

October 4, 1990

The Union wrote Respondent's attorney on October 4:

> We have discussed your letter of September 13, 1990, with David Day, our International Collective Bargaining Representative, and we believe that the Employer and the Union are *not* at impasse on many items. Mr. Day has tried to contact you about setting up future negotiations, which you have refused.
>
> The Union objects to the unilateral changes in policies, the pay day and past practices as outlined in your letter, some of which you have already instituted. We believe that the policy changes without giving the Union further opportunity to bargain are illegal and in violation of the National Labor Relations Act, and are directed at the employees in retaliation for their union activity. We have already filed charges with the National Labor Relations Board.
>
> Again we are requesting an opportunity to bargain with the Employer over these and any other changes in policy or past practices, as well as an entire collective bargaining agreement. We are available October 15, 16 or 18.

October 10, 1990

On October 10, Respondent's attorney wrote the Union expressing his willingness to meet.

Julian Gignilliat testified that Respondent expressed a willingness to resume negotiations despite their having declared an impasse because he felt there was a greater likelihood of success in negotiating a contract after implementation of some changed working conditions.

October 29, 1990

On October 29, Respondent's new administrator, Ronald Hendrix, posted a memo to employees. That memo included the following paragraph:

> In order to reduce conflict, I have recommended to the Board of Trustees, and the Board has agreed, that one of the several lawsuits involving our employees be settled. This means that we will put into effect a new pay plan which combines the principles of guaranteed rates of pay based upon length of service and qualifications with the opportunity to earn higher rates of pay based on merit. Since I am new here, I have decided that all employees who were employed on January 1, 1990, and have not received a wage increase of three percent since December 15, 1989, merit an increase of at least three percent or of whatever amount is necessary to bring their total 1990 increases up to a three percent raise over their December 15, 1989 rates. These increases will go into effect October 29, 1990.

November 8, 1990

The parties discussed the administrator's notice (above) regarding the October 29 pay increase. Respondent advised the Union that by that action they were putting their April 1, 1990 proposal of a new pay plan, into effect.

The Union disagreed with Respondent's unilateral implementation of the pay increase, they disagreed with the amount of the increase and they disagreed on the fact that it had not been granted effective January 1, 1990. Respondent would not agree to make the pay plan retroactive to January 1.

The Union stated that they were not at impasse despite Respondent's expression that they were.

The Union stated they had proposed implementation of the pay plan back in January and February and Respondent replied that was the only leverage they had to get a contract with the Union.

The Union made new proposals on wages, attendance bonus, and timeclocks. That written proposal was for a 6-percent pay increase, a day's pay but not a day off, for 6 months' perfect attendance, and the immediate implementation of timeclock proposal.

The above proposal regarding timeclocks was, according to Hanson, an agreement to the Respondent's proposal on timeclocks.

Respondent's spokesperson said that he would not submit the Union's pay proposal and that he was rejecting that proposal. The parties discussed Respondent's new policy of paying for sick leave on the second day and the Union pointed out that encouraged employees to stay out at least 2 days.

The Union made a counterproposal that employees that worked at least 37-1/2 hours a week be considered full time even though the hours were all worked during 4 days. The Union went over their proposed contract and made modifications to some of those proposals including withdrawing some provisions. The Union told Respondent that they would be sending a new wage proposal since their proposal of that day had been rejected.

November 15, 1990

On November 15, the Union wrote Respondent indicating they had reserved a room for the next negotiating session on November 21, 1990, and including some new counterproposals and modifications of old collective-bargaining contract proposals.

November 21, 1990

The parties met on November 21. Respondent gave the Union a list of employees that had received the October 29 pay increase noting that some of the employees had incorrectly received increases in excess of the scheduled increase and that those errors would be corrected. Respondent advised the Union that they were unwilling to agree to any of the counterproposals which the Union had included in their November 15 letter. The parties then went over all the outstanding items from Respondent's contract proposal, noting whether there was agreement or not on each item and the Union modified some of their former positions, including in many instances noting they would agree to Respondent's proposed items.

The Union requested information on the current cost of single and dependent health insurance coverage.

As to the grievance procedure the Union continued to insist in disagreement with Respondent, on arbitration.

December 18, 1990

Respondent told the Union they had no proposed changes in their previous positions. The Union asked about their requests for areas for union activity. Respondent said they were willing for them to use some areas that were not used by residents and those were specified, however, Respondent was unwilling to include anything in that regard in the contract. Respondent gave the Union copies of some postings for job vacancies including one dated November 21 for two full-time nursing assistant positions. That posting noted that the applicant must work all three shifts. The posting also included the following paragraph:

> The employees who are given full time status must work their scheduled hours beginning immediately. If the scheduled hours are not worked, the employee will be returned to part time status and will lose full time benefits and someone else will be changed to full time status.

Eileen Hanson testified that this was the first time the Union had received notice that Respondent's job postings would require employees to work all three shifts in order to qualify for full-time status.

> The Union verbally proposed that all employees receive a 5-percent pay increase effective January 1, 1991. Respondent did not respond to that proposal.

February 14, 1991

The Union asked what impact the anticipated increase in the minimum wage law would have on April 1 when the minimum was scheduled to go to $4.25. Respondent replied that the only impact was that employees paid below that figure would go to $4.25. Respondent told the Union there had been no wage increase for anyone in the bargaining unit for

1991. The parties discussed several of the items on the proposals.

The Union made a verbal proposal for a review of each employee for merit increase consideration during the quarter of the year in which the respective employee's anniversary date fell and that merit increases would fall from 3 to 5 percent. Respondent did not respond to the Union's proposal.

The Union proposed that all employees receive a 5-percent increase in pay effective February 1, 1991. There was discussion regarding the Union's proposals.

Respondent asked for the Union's position on grievance procedure and the Union responded they may be willing to have a three person panel rather than an arbitrator.

Hanson then testified as follows:

> [Respondent's attorney] then outlined what he felt were three (3) outstanding issues that were—where we were still in disagreement.
>
> . . . .
>
> And those issues were the Pay Plan. He said that he would recommend to his client our proposal about the four (4) review periods with the three (3) to five (5) percent merit raise. But that he could not imagine that they would do the five (5) percent across the board raise.
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> The second issue was Employment-at-Will and the third issue was Arbitration. He said that his client was not going to sign any contract that had arbitration in it.
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> . . . .
>
> Well, Mr. Davis [Union] said if—we would consider going with the Administrator if they would drop their provision for Employment-at-Will. And that he thought that Mr. Hendrix would be fair minded.
>
> Mr. Gignilliat outlined two (2) issues then, that if Bethea gave up employment-at-will, that—if the Employment-at-Will issue and the merit raise the five (5) percent. He also indicated that they had given a three (3) percent merit raise to the non-bargaining unit employees at January 1, 1991. He said that he would still be talking about a contract of one (1) year and that he would have to deal with the finance committee.
>
> Q. Did the Union agree with the Company's—with Mr. Gignilliat's assessment that there were then just two (2) issues between them?
>
> A. We did not agree with that. He asked if we would go—I'm sorry. The Union said that—he said he would like a final proposal from the Union. And we said that we would go through—that Mr. Davis and I would get together and we would go through all the different Articles and provisions that we had agreed on and the things that we had made movement on and things that we had taken off the table. That we would work to get up a final proposal and that we would get back with them.
>
> Q. When Mr. Davis indicated that the Union might be willing to go along with the Administrator as the final determiner of fact if the Company would drop the Employment-at-Will provision was there any response from the Union on that—uh, from the Company on that?
>
> A. They did not indicate that they were willing to do that.
>
> Q. Was that basically the end of that bargaining session?
>
> A. Yes.
>
> Q. When was the next bargaining session?
>
> A. That was the last bargaining session we had.

Julian Gignilliat testified in substantial agreement with Hanson's above testimony.

February 18, 1991

Respondent's attorney wrote the Union on February 18 and enclosed a copy of a contract which he stated he would recommend to Respondent's board of trustees. The letter included a request that the Union indicate if they were willing to accept the proposal objecting to only the employment-at-will language in which case the Union may strike that language and stating that their acceptance is conditioned on a 5-percent pay raise effective retroactively on February 1, 1991. Gignilliat mentioned in the letter that although settlement of an ongoing lawsuit would not be part of the collective-bargaining agreement, he mentioned that settlement would affect the voting of the trustees.

The letter continued that Gignilliat would recommend that contract to the trustees but he felt they would not agree to any pay increase over what the nonunit employees had received.

Near the end of his letter Gignilliat stated:

> I do not know that I would persuade the Board, but if this would not do it, I cannot imagine what would. By the same token, it may be that your membership would not ratify such an agreement, but if it did not, then it would be obvious to both of us that we would never get any closer together.

May 1, 1991

On May 1, the Union wrote Respondent asking for a meeting on May 15 and for a list of new hires and relevant information regarding those hires. The Union also requested that Respondent place Patricia Harrison and Patricia Kelly on full-time status.

May 3, 1991

On May 3, Respondent wrote the Union:

> This is in response to your letter dated May 1, 1991. At the close of our last bargaining session on February 14 of this year, I understood Ed Davis to have made a proposal from the union which substantially narrowed the issues which separated us. A few days later, I wrote Ed a letter which represented the final *offer* which Bethea would make but in which I indicated to him that if the union made a counterproposal along certain specified lines, I would advise my client's board of trustees to make a change in its position which would achieve a contract. Several weeks later, Ed asked me to meet him and union president Muncus for lunch to discuss a contract. Our meeting was congenial, but Mr. Muncus returned to a position which was further away than the last position which Ed Davis had taken.
>
> You have our final offer. We are at an impasse and further meetings will accomplish nothing. For that rea-

son, Bethea declines to negotiate further unless and until the union agrees to the terms set forth in my last letter to Ed Davis.

Bethea's position regarding further negotiations is not a withdrawal of recognition. You have asked for copies of nursing and dietary schedules from March 18th to the present and they will be provided to you. We will provide future schedules in response to your written requests.

You have also asked for a list of new hires, including dates of hire, part-time and full-time status, rate of pay, job classification and address. It will be provided, as will be a list of terminations since the last list given to you.

You have asked that Patricia Harrison and Patricia Kelly be given full-time status immediately. That request is denied. Patricia Harrison was given full-time status several months ago but found that she continued to be unable to work night shifts. Unless and until she demonstrates persuasively that she is actually able to work night shifts on a regular basis, she will not be considered for full-time status. As you have previously been told, Patricia Kelly was considered and rejected for full-time status because of her atrocious record of attendance. Shortly after her recent direct request for full-time status she was observed sleeping at work. Ms. Kelly will not be considered again for full-time status unless and until she demonstrates reliability by a prolonged period of time without absences and without inattention to her duties when she is at work.

Respondent's attorney and chief spokesperson Gignilliat testified that during the April meeting which he attended with Ed Davis from the Union and Local Union President Tony Muncus, Muncus stated it was the Union's position that they would not sign a contract that did not contain a clause limiting discipline to just cause and containing an arbitration clause. Gignilliat responded that the parties were further apart in that case because Respondent was not going to sign a contract that contained that language.

Findings

Bargaining in Bad Faith Since September 28, 1989

General Counsel cited several cases including *A-1 King Size Sandwiches*, 265 NLRB 850, 859, enfd. 732 F.2d 872, 877 (11th Cir. 1984); *Reichhold Chemicals*, 288 NLRB 69, 71 (1988); *Prentice-Hall, Inc*., 290 NLRB 646 (1988); *Modern Mfg. Co*., 292 NLRB 10 (1988); *Harrah's Marina*, 296 NLRB 1116 (1989), and argued that Respondent continually insisted on proposals which, if accepted, would have put the employees in worse position than they would have been without a contract and, thereby, engaged in bad-faith bargaining. General Counsel especially argued that Respondent was unwilling to agree to any meaningful offer by the Union; that its spokesperson expressed its intent to give the employees fewer rights than they had before they selected the Union; and that it insisted on management rights, grievance, and employment-at-will provisions that would have left the employees virtually without any union representation; and thereby illustrated an intent never to enter into a collective-bargaining agreement with the Union.

Respondent raises several points in its defense. Respondent, from shortly after the Union's certification and request to commence bargaining, met and negotiated with the Union. Although there were lapses in the regularity of negotiating meetings, those were not caused by Respondent but by the Union.

In that regard, Respondent argued that the record evidence proved that from February 23 through November 8, 1990, only one full fledged negotiating session was held because of the Union's involvement in a dispute with another employer.

A full committee attended negotiating session was held on February 23, 1990. Thereafter although a meeting was held involving Respondent Negotiator Gignilliat and Union Negotiators Ed Davis and David Day on March 7, there were no full committee attended negotiating sessions until June 20, 1990.

Union Negotiator Eileen Hanson testified in a prehearing affidavit that nothing was scheduled in April or May because Union Negotiator David Day was involved in negotiations with another employer, Kroger, and that a scheduled June 1 negotiation session was postponed because of the possibility of a strike at Kroger.

Respondent argued that there was another lapse in negotiations after the June 20 negotiation session because it heard nothing from the Union until after it received a letter dated July 25 from an attorney representing several of its employees in a civil suit in which the attorney proposed a settlement of that civil suit coupled with settlement of the contract dispute. Respondent contends that it would have been a violation of Section 8(a)(5) if it had proposed such a settlement. Instead Respondent wrote the Union on August 3, advised the Union of the attorney's proposal, and asked if that represented the Union's best offer. The Union responded that the attorney's proposal did represent their best offer. Respondent contends that the Union's best offer which was coupled with settlement of the civil suit, and which was rejected by Respondent, placed the parties at impasse. Respondent cited *Chesapeake Plywood*, 294 NLRB 201 (1989); *Laredo Packing Co*., 254 NLRB 1 (1981); *Good GMC, Inc*., 267 NLRB 583 (1983).

The attorney in the civil suit suggested to Respondent a specific settlement of the civil suit. His letter to Respondent outlined issues that he felt may lead to settlement of the collective-bargaining negotiations, including:

2. Implementation of a union contract to include the following provisions, as well as those already agreed upon between the company and the union:

(a) Just cause for disciplinary actions and grievances
(b) Reasonable work rules
(c) Reasonable access by union representative
(d) Standard check-off language
(e) Weekly dues deductions; remit to local monthly
(f) Drop employment at will, physical and mental condition and surveillance (employee integrity) language.
(g) Three year contract duration
(h) Return to company's former policy as to vacations, sick leave, meals and other benefits.

(i) Maintain current policy on health and welfare for a three year term.

(j) Grievance and arbitration per union proposal

(k) Pay Plan as follows:

After Respondent's attorney wrote the Union on August 3 asking if the above did in fact represent the Union's best offer, the Union responded on August 9, 1990:

> In response to your letter dated, August 3, 1990, and after discussions, contact and deep consideration with all parties involved with respect to the issues, we are confirming that this is the offer for settlement in all areas both contractual and legal. We would request that you submit this offer for consideration to the Board of Directors of the South Carolina Baptist Council.
>
> We believe strongly that this proposal is no more than what the nursing home is presently doing with respect to fairness and reasonableness in most issues. It would go a long was to correct the discrimination presently existing in the area of wage rates.
>
> We would appreciate your reviewing your calender and notifying us of available future dates for negotiations. We look forward to hearing from you so that I can make arrangements to attend those negotiations.

On September 13, 1990, Respondent's attorney wrote the Union. That letter included the following:

> This is to confirm our earlier conversation regarding the status of negotiations at Bethea. I have absolutely no doubt that we are at impasse. Frankly, I think that we have been there since February, but it is crystal clear now.
>
> We are quite willing to have a contract with the UFCW. You have our terms. They are still available to you. I hope that the union will agree to these proposals so that we can begin to build the teamwork and cooperative spirit which is in the mutual best interest of your members and my client.
>
> Whether we have an agreement or not, or prior to entering into one, there are certain changes and conditions which we have proposed to the union and which we have now decided to put into effect. The first of these is to go to a bi-weekly pay day.

The record does show that the parties were progressing during negotiations before September 13, 1990. Respondent's attorney expressed an understanding that in the March 7 meeting during which Respondent's attorney met with Ed Davis and Dave Day of the Union, the parties discussed the entire contract and that seven issues remained in dispute and that the parties had reached tentative agreement on all other issues. Respondent's attorney repeated his belief that seven issues remained in dispute, in a March 9, 1990 letter to the Union.

Respondent is correct that with the exception of a June 20 negotiating session, the parties did not meet over a lengthy period. That delay was due to Union's involvement in another labor matter.

However, despite the time lag, the record failed to reveal that anything occurred during that period which supported a belief that impasse had occurred until, as noted above, Respondent received the employees' attorney's letter.

The case law cited by Respondent does not support the position that Respondent may declare an impasse if the Union offers settlement contingent on settlement of a civil suit. In *Chesapeake Plywood*, 294 NLRB 201 fn. 3 (1989), the Board stated:

> While the Respondent could not lawfully insist on modifications in their specified Title VII settlement agreement provisions before the 5 years was up, it was of course permitted to propose such modifications to the Union.

In *Chesapeake Plywood* the Board again illustrated that the question rest on whether the Union negotiated to impasse over the question of coupling settlement of the civil suit with agreement to a collective-bargaining contract.

In *Laredo Packing Co*., 254 NLRB 1, 19 (1981), the administrative law judge indicated that the mere proposing of settlement of a lawsuit is not per se illegal. Again, the question turned to was there an insistence on settlement of the civil suit to the point of impasse.

In *Good GMC, Inc*., 267 NLRB 583 (1983), the Board reversed on finding that the evidence did not show that the parties reached impasse solely because they were unable to agree on settlement of a former grievance. Again the matter turned on whether the employer in that case had insisted on the nonmandatory bargaining subject to impasse. There the Board explained it is necessary to examine the record to see if there would have been agreement on all contractual issues.

The record here shows that the parties did not bargain to impasse on a nonmandatory issue, i.e., settlement of the civil lawsuit. As to that question the record failed to show that matter was even in dispute. As shown below on February 18, 1991, Respondent's attorney in a letter to the Union indicated that a settlement of the civil lawsuit would influence Respondent's board of directors favorably when they considered the Union's collective-bargaining contract proposal.

Additionally, as shown above, there were seven matters in dispute according to Respondent's attorney which did not involve nonmandatory issues.

After Respondent Attorney Gignilliat met with two representative of the Union on March 7, there remained according to Gignilliat, seven issues in dispute. The parties met again on June but there was no showing of impasse at that time.

The parties did not meet again until Respondent declared an impasse on September 13. At the time of the letter from the employees attorney, according to the understanding of Julian Gignilliat, the parties had reached tentative agreement on all but seven mandatory issues. The record does not show that the parties were at impasse on those seven issues.

Therefore, I do not agree with Respondent's argument that the Union brought the parties to impasse when it offered to settle both the contract dispute and a civil lawsuit brought against Respondent by some of its employees. It is clear that that nonmandatory issue did not cause an impasse.

The parties did resume negotiations after Respondent declared an impasse and instituted unilateral changes in working conditions. Following a letter from the Union dated October 4 requesting continued negotiations, Respondent agreed and negotiations were renewed on November 8, 1990.

Respondent argued that agreement was close when the parties met on February 14, 1991. Respondent in its brief argued that only two issues divided the parties at that time. There was a difference in the amount of a pay increase with the Respondent willing to grant 3 percent while the Union insisted on 5 percent and there was a dispute as to whether the contract would contain an employment-at-will or a just-cause provision.

However, Respondent argued that when Respondent met with the Union again in April, Local President Tony Muncus was involved for the first time during the negotiations and Muncus indicated that the Union would not agree to a contract that did not include arbitration and just cause even though the Union had indicated in February that they were willing to consider such a contract. At that point Respondent broke off negotiations. Respondent argued that further negotiations would be pointless. Respondent cited *NLRB v. Big Three Industries*, 497 F.2d 43, 48 (5th Cir. 1974); *NLRB v. Tomco Communications*, 567 F.2d 871, 881 (9th Cir. 1978); *L. W. LeFort Co.*, 290 NLRB 344 (1988).

It does appear that Muncus' position was regressive. At that point the parties were as close to agreement as they had been. Obviously, as Respondent argues, the gulf widened when Muncus announced the Union would not agree to a contract without arbitration.

Nevertheless, General Counsel argued that Respondent had continually bargained in bad faith and, because of Respondent's bad-faith bargaining, the parties were not at legal impasse on February 14, 1991.

Before the September 29, 1989 bargaining session, Respondent submitted a proposed collective-bargaining agreement. Among other things that proposed contract included an employment-at-will provision which provided:

> Notwithstanding any other provisions of this Agreement, all employees are employed at will. This means that each employee has the right to terminate his employment at any time, with or without notice and with or without reason, and that the Employer has the same right.

The proposed contract included a grievance procedure that included at step 1 a meeting between the grievant and, if desired, a representative of the Union, and the grievant's department head; and at step 2, final resolution of the grievance by Respondent's administrator.

In that regard there appeared to have been several significant negotiating sessions. Some of those significant sessions include the following:

On December 12, 1989, the parties met and as noted above,

Respondent presented a package proposal involving acceptance of the Union dues checkoff in exchange for the union agreeing to incorporation of Respondent's proposed provisions on management rights, employment at will, and employment integrity. Respondent refused to agree to union proposals including continuation of free meals in view of the upcoming increase in the minimum wage by law. Respondent was considering charging for meals. Although the Union indicated a willingness to agree to the current probationary period of 60 days, Respondent would not agree indicating they may want to increase it to 90 days. Respondent said they wanted to increase the number of part-time employees and decrease full-time employees and that they did not want to agree to firm rules for determining part as opposed to full-time employment status but wanted that determination left to the discretion of the administrator (as shown below, Respondent subsequently engaged in an illegal unilateral change in its practice of qualifying employees for full-time status). Respondent opposed permitting job bidding for vacant jobs on seniority as not being consistent with their desire for employment at will. Respondent would not agree to include anything in the contract which would entitle the Union to seniority lists after negotiations concluded. Respondent continued to oppose any visitation rights by union officials. Respondent continued to oppose inclusion of job descriptions in the contract. Respondent opposed inclusion of provisions for union bulletin boards or the right of the Union to post notices on other bulletin boards.

The parties met and negotiated on January 18, 1990, and, as shown above,

Respondent provided a proposed grievance procedure and, in addition to its earlier two-step proposals, stated its willingness to included a paragraph stating that the Union could sent a 10-day letter to Respondent and Federal Mediation of the existence of a labor dispute in the event the grievance was not resolved by the determination of the administrator (Respondent's proposed second step).

Respondent told the Union they would have some revisions in their previous positions on leave of absence. The current policy was for Respondent not to force an employee out for sickness that had used all his or her sick leave, to use accrued vacation time. Under the policy employees could, after exhausting their sick leave, go on a leave without pay status instead of using their vacation time. Respondent expressed a desire to change that so that it could force the exhaustion of all vacation time before permitting an employee to take sick leave without pay.

As to meals and breaks, Respondent opposed inclusion in the contract, of a break period provision even though it indicated that it may grant breaks at its discretion and Respondent said it would probably discontinue its free lunch policy when ever the new minimum wage law went into effect.

The Union asked if Respondent had given a raise to anyone in the bargaining unit and Respondent replied no. The Union said they would propose a wage increase for unit employee for 1990 during the next negotiating session. Respondent said they would agree only as part of the entire contract but that they were willing to discuss the matter during the next session.

The February 23, 1990 meeting was also significant. As shown above,

There was discussion regarding some new hires by Respondent at the rate of $4 per hour. The parties discussed and Respondent explained its position on employment at will which was explained to exclude anything that would constitute a violation of Federal law but that Respondent wanted to reserve the right to discharge at will. The Union asked about the employee integrity clause and Respondent's past explanation of its desire to include employee surveillance measures. The Union asked why they wanted this now in view of the fact those measures had not been taken in the past. Respondent said they had had the right to do that in the past but the law said these matters must be negotiated

and Respondent wanted to have these rights included in the contract or in a side letter.

The management-rights proposal of Respondent was again discussed and particularly Respondent's desire for the right to discipline employees for off-work activities. Respondent explained that they wanted the right to discipline someone even if that person was found not guilty of the allegations, in a court of law. Respondent also contended they wanted the right to take action against an employee if a patient complained about the employee even if the patient was confused and the patient's accusation was false.

As shown above, I find that Respondent declared an impasse prematurely on September 13, 1990.

The November 21, 1990 session was also significant in considering General Counsel's contention of bad-faith bargaining, in that session Respondent advised the Union that they were unwilling to agree to any of the counterproposals which the Union had included in their November 15 letter.

In a December 18, 1990 meeting, Respondent told the Union they had no proposed changes in their previous positions.

On February 14, according to Eileen Hanson's testimony:

> [Respondent's attorney] then outlined what he felt were three (3) outstanding issues that were—where we were still in disagreement.
>
> . . . .
>
> And those issues were the Pay Plan. He said that he would recommend to his client our proposal about the four (4) review periods with the three (3) to five (5) percent merit raise. But that he could not imagine that they would do the five (5) percent across the board raise.
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> The second issue was Employment-at-Will and the third issue was Arbitration. He said that his client was not going to sign any contract that had arbitration in it.
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> Well, Mr. Davis [Union] said if—we would consider going with the Administrator if they would drop their provision for Employment-at-Will. And that he thought that Mr. Hendrix would be fair minded.
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> Mr. Gignilliat outlined two (2) issues then, that if Bethea gave up employment-at-will, that—if the Employment-at-Will issue and the merit raise, the five (5) percent. He also indicated that they had given a three (3) percent merit raise to the non-bargaining unit employees at January 1, 1991. He said that he would still be talking about a contract of one (1) year and that he would have to deal with the finance committee.
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> Q. Did the Union agree with the Company's—with Mr. Gignilliat's assessment that there were then just two (2) issues between them?
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> A. We did not agree with that. He asked if we would go—I'm sorry. The Union said that—he said he would like a final proposal from the Union. And we said that we would go through—that Mr. Davis and I would get together and we would go through all the different Articles and provisions that we had agreed on and the things that we had made movement on and things that we had taken off the table. That we would work to get up a final proposal and that we would get back with them.
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> Q. When Mr. Davis indicated that the Union might be willing to go along with the Administrator as the final determiner of fact if the Company would drop the Employment-at-Will provision was there any response from the Union on that—uh, from the Company on that?
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> A. They did not indicate that they were willing to do that.
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> Q. Was that basically the end of that bargaining session?
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> A. Yes.
>
> Q. When was the next bargaining session?
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> A. That was the last bargaining session we had.

On February 18, 1991, Respondent's attorney wrote the Union and enclosed a copy of a contract which he stated he would recommend to Respondent's board of trustees. The letter included a request that if the Union was willing to accept his proposed contract, objecting to only the employment-at-will language, the Union may strike that language and state that their acceptance is conditioned on a 5-percent pay raise effective retroactively on February 1, 1991. Gignilliat mentioned in the letter that although settlement of an ongoing lawsuit would not be part of the collective-bargaining agreement, settlement of the lawsuit would affect the voting of the trustees.

The contract enclosed in Gignilliat's letter included a broad managements-rights clause which continued to include, among other things, the right of Respondent to hire and fire without showing just cause (as noted above Respondent had explained that the right to discharge included the right to discharge an employee for activities at or away from work without regard to whether that employee was found innocent in a court of law); the right to select the number of employees and increase or decrease that number; and, among other things, the right to promulgate rules and regulations governing the conduct and acts of employees. Penciled in were additional management rights as follows:

> 19. Change the terms of or to eliminate any working conditions or fringe benefits not expressly provided for in this agreement, including but not limited to annual bonuses and the provision of free food and beverages to employees.
>
> 20. Use leased employees, volunteers and/or non-bargaining unit members to perform bargaining unit work.

Also included was a side letter which included the employment-at-will provision which was quoted earlier in this decision, along with the employee integrity clause which would give Respondent the right to monitor employee activities with television or film cameras, invisible dyes and powders, and to use polygraph and other deception devices.

The letter continued that Gignilliat would recommend that contract to the trustees but he felt they would not agree to any pay increase over what the nonunit employees had received.

On May 3, Respondent wrote the Union:

> This is in response to your letter dated May 1, 1991. At the close of our last bargaining session on February 14 of this year, I understood Ed Davis to have made a proposal from the union which substantially narrowed

> the issues which separated us. A few days later, I wrote Ed a letter which represented the final *offer* which Bethea would make but in which I indicated to him that if the union made a counterproposal along certain specified lines, I would advise my client's board of trustees to make a change in its position which would achieve a contract. Several weeks later, Ed asked me to meet him and union president Muncus for lunch to discuss a contract. Our meeting was congenial, but Mr. Muncus returned to a position which was further away than the last position which Ed Davis had taken.
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> You have our final offer. We are at an impasse and further meetings will accomplish nothing. For that reason, Bethea declines to negotiate further unless and until the union agrees to the terms set forth in my last letter to Ed Davis.
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> Bethea's position regarding further negotiations is not a withdrawal of recognition. You have asked for copies of nursing and dietary schedules from March 18th to the present and they will be provided to you. We will provide future schedules in response to your written requests.
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> You have also asked for a list of new hires, including dates of hire, part-time and full-time status, rate of pay, job classification and address. It will be provided, as will be a list of terminations since the last list given to you.
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> You have asked that Patricia Harrison and Patricia Kelly be given full-time status immediately. That request is denied. Patricia Harrison was given full-time status several months ago but found that she continued to be unable to work night shifts. Unless and until she demonstrates persuasively that she is actually able to work night shifts on a regular basis, she will not be considered for full-time status. As you have previously been told, Patricia Kelly was considered and rejected for full-time status because of her atrocious record of attendance. Shortly after her recent direct request for full-time status she was observed sleeping at work. Ms. Kelly will not be considered again for full-time status unless and until she demonstrates reliability by a prolonged period of time without absences and without inattention to her duties when she is at work.

Respondent's attorney and chief spokesperson Gignilliat testified that during the April meeting which he attended with Ed Davis from the Union and Local Union President Tony Muncus, Muncus stated it was the Union's position that they would not sign a contract that did not contain a clause limiting discipline to just cause and containing an arbitration clause. Gignilliat responded that the parties were further apart in that case because Respondent was not going to sign a contract that contained that language.

In considering allegations of bad-faith bargaining, the Board examines the content and reasonableness of a party's contract proposals to determine whether they were advanced with an open mind or with intent to frustrate agreement. *Harrah's Marina*, 296 NLRB 1116 (1989); *NLRB v. Wright Motors*, 603 F.2d 604 (7th Cir. 1979); *A-1 King Size Sandwiches*, 265 NLRB 850 (1984), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1985).

In *Harrah's Marina*, supra, Administrative Law Judge Giannasi wrote:

> The Board, with court approval, has consistently found unlawful an employer's rigid and uncompromising attempt in bargaining to retain unilateral control over wages. See *A-1 King Size Sandwiches*, supra, 265 NLRB at 857–861; *Tex-Tan Welhausen Co*., 172 NLRB 851, 879–880 (1968), enfd. 419 F.2d 1265 (5th Cir. 1969); *Alba-Waldensian, Inc*., 167 NLRB 695, 696 (1967), enfd. 404 F.2d 1265 (4th Cir. 1968). See also *A. H. Belo Corp. v. NLRB*, 411 F.2d 959, 968 (5th Cir. 1969), cert. denied 396 U.S. 1007 (1970). An employer's conduct in this respect not only precludes bargaining on the most important issue in negotiations, but it renders bargaining a pretense. Employees would be better off without a contract for the statute itself precludes unilateral action in the absence of a legitimate impasse after good-faith bargaining. But a clause such as that herein would permit unilateral action on wages that would be prohibited absent a contract. See *Eastern Maine*, supra, 253 NLRB at 246, and cases there cited; and *Reichhold Chemicals*, [288 NLRB 69] discussing *A-1 King Size Sandwiches*, supra.

Here, Respondent did not take the adamant position taken by *Harrah's Marina* by insisting on retaining unilateral control over wages but Respondent continually insisted on retaining unilateral control over the size and use of the bargaining unit employees; unilateral control over disciplinary action including discharges and unilateral control over employees' activities both at and away from work without regard to whether allegations against employees were disproved in a court of law. As in *Marina*, Respondent here by its continual position in bargaining, and by its illegal unilateral changes in working conditions noted below, rendered bargaining a pretense. Its employees would have been better off without a contract than they would have been under the contract proposed by Respondent because the ''statute itself precludes unilateral action in the absence of a legitimate impasse after good-faith bargaining.'' And the statute itself provides better recourse to grievance practices than that proposed by Respondent.

Despite Respondent's insistance on ultimate control over working conditions, it appeared that the parties approached agreement on February 14, 1991. However, even then the Respondent did not relax its insistence on unilateral control over its employees' working conditions. It did hold out the possibility that if the Union was willing to accept all its proposals and the parties could agree on wages, then it may consider dropping its employment-at-will provision. Nevertheless, Respondent never did specifically offer to relax employment at will.

As stated in *A-1 King Size Sandwiches, Inc*., 265 NLRB 850, 860–861 (1982):

> In the instant case, as in *Wright Motors*, Respondent's proposals, if accepted, would have left the Union and the employees with substantially less rights and protection than they would have had if they had relied solely upon the certification. Without agreeing to Respondent's proposal, the Union had the right to prior notice and bargaining concerning all changes or modi-

> fications in terms and conditions of employment and it retained the right to strike in protest of such actions and in protest of conduct violative of the employees' other legal rights. Acceptance of Respondent's proposal would have denied the Union even of the right to notice concerning such fundamental matters as the elimination of some or all of the unit jobs. Could sophisticated counsel have any reasonable expectation of agreement to proposals which would delete those rights, particularly when there was not even the offer to maintain the status quo in regard to existing working conditions? I do not believe so and I must therefore conclude that Respondent intended ''to frustrate and insure the failure of the collective-bargaining process.''

I find that Respondent engaged in bad-faith bargaining.

Unilaterally Changed Working Conditions

General Counsel argued that no legally cognizable impasse existed when Respondent declared an impasse on September 13, 1990, and again on May 3, 1991. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963); *Massillon Community Hospital*, 282 NLRB 675 (1987).

Respondent defended against this overall allegations on the grounds there was an impasse in negotiations and that the actual unilateral changes were changes it had proposed during negotiations.

Withheld Wage Increases

Shirley Murray who has worked for Respondent for 24 years testified that for approximately 15 years before 1990, Respondent granted the employees a pay increase each January. She testified that she did not receive an increase in 1990 after the Union was elected.

Carol Bishop testified that Respondent's employees routinely received a wage rate increase during January of each year until after the union campaign in 1989. Since that time the employees did not receive a wage increase in 1990 or 1991.

Bishop, who is on the Union's negotiating committee, testified that Respondent did not mention any changes in its policy regarding annual raises during negotiations.

Carolyn McPhail testified that their last pay increase was in January 1989 and that she was increased from $3.35 to $3.50 per hour.

Nurses Aide Emma Ford testified that the aides have received a raise every year since she started working for Respondent in 1974 except for the last 2 years. Ford testified that Respondent has not granted wage increases in 1990 and 1991.

Business Agent Hanson testified that the Union was told during the first negotiating session that Respondent generally granted their raises to employees on the first of the year and that raises were voted on by Respondent's board of directors.

Additionally, the testimony of Eileen Hanson illustrated that the matter of 1990 and 1991 wage increases for unit employees was discussed during negotiating sessions and Respondent did not dispute the Union's statements that unit employees had not received their customary wage increases in January 1990 and 1991.

The evidence illustrated that during the January 18, 1990 bargaining session the Union asked if Respondent had given a raise to anyone in the bargaining unit and Respondent replied no. The Union said they would propose a wage increase for unit employee for 1990 during the next negotiating session. Respondent said they would agree only as part of the entire contract but that they were willing to discuss the matter during the next session.

Respondent does not dispute that it did withhold a wage increase for unit employees in January 1990 and January 1991, while its nonunit employees were granted wage increases on those occasions or that it withheld those increases without having reached an impasse in negotiations. Respondent argues that it had proposed a formal pay plan in September 1989 negotiations with the Union and that it would have been inconsistent with that proposal for it to grant wage increases to unit employees in 1990 and 1991. Respondent cited *McGraw Edison Co*., 172 NLRB 1604 (1968); *Postal Service*, 261 NLRB 505 (1982).

General Counsel, in arguing that Respondent unilaterally changed its practice without bargaining about the change pointed out that Respondent's September 1989 contract proposal included minimum and maximum pay rates for unit positions and increases not to exceed 3 percent annually based on merit.

General Counsel argued that the record established that it was Respondent's regular practice of several years standing to grant all employees annual wage increases and, by failing to do so in 1990 and 1991 Respondent violated Section 8(a)(5) of the Act. General Counsel cited *Guy Gannett Publishing Co*., 295 NLRB 376 (1987); *Carolina Steel Corp*., 296 NLRB 1279 (1989); *Rocky Mountain Hospital*, 289 NLRB 1347 (1988); *Uarco Inc*., 283 NLRB 299 (1987); *Southeastern Michigan Gas Co*., 198 NLRB 1221 (1972); *Gas Machinery Co*., 221 NLRB 862 (1975); *Allied Products Corp*., 218 NLRB 1246, 1252–1253 (1975).

Additionally, General Counsel argued that Respondent's action in withholding the wage increases violated Section 8(a)(3) of the Act because it was taken because its employees selected the Union.

Findings

The record supports General Counsel. Respondent had an established long standing practice of granting annual wage increases to its employees during January of each year. In 1990 and 1991, Respondent unilaterally withheld a wage increase for bargaining unit employees even though it granted its customary wage increase to its nonunit employees.

As shown in the above cases cited by General Counsel, the Board had long held that an employer may not unilaterally change its established practices without bargaining to a contract or to impasse. Here, there was no question of impasse. Respondent withheld wage increases in 1990 and 1991 without regard to whether there was an impasse and, in fact, there was no impasse, and, Respondent did not negotiate regarding its actions prior to January 1990 or January 1991.

The cases cited by Respondent do not support a contrary finding. In *McGraw Edison* the Board found a violation where the employer unilaterally changed incentive wage rates and in *Postal Service* the Board found the employer acted in accord with established practice by randomly granting wage increases to nonunit employees.

I find that Respondent engaged in conduct violative of the Act by withholding wage increases from employees represented by the Union in January 1990 and January 1991.

Changed Pay Periods (Around September 13, 1990)

In a September 13, 1990 letter to the Union Respondent's attorney advised the Union of the following:

> Whether we have an agreement or not, or prior to entering into one, there are certain changes and conditions which we have proposed to the union and which we have now decided to put into effect. the first of these is to go to a bi-weekly pay day. This is a change which had been planned last summer but which was shelved because of the election petition. I enclose a memo to employees which explains the details of the change.

Julian Gignilliat admitted that Respondent did change its pay periods from payment each week to payment every other week.

Findings

As discussed above, I find that Respondent engaged in illegal activity by declaring an impasse on September 13, 1990. An employer may not legally implement unilateral changes in working conditions without negotiating to contract or impasse, regarding those changes. Here, that did not occur.

Installed Timeclocks for Employees

Respondent's attorney continued in his September 13 letter to the Union:

> We are ''moving forward'' with the purchase of timeclocks, which is another change planned prior to the petition being filed. I do not know when the clock(s) will be purchased, but it should be soon. This, too, I think is in the mutual interest of the employees and Bethea.

Julian Gignilliat testified that Respondent did not actually install timeclocks until later after the Union informed Respondent that they wanted them to install the timeclocks.

Findings

Counsel for Respondent moved to dismiss the allegation of unilateral installation of timeclocks on the grounds there had been no evidence introduced other than to show there had been agreement on the installation of timeclocks. General Counsel argued in opposition to that motion, that the record supported the allegation. In that regard General Counsel referred to Respondent's letter declaring an impasse as evidence of this particular allegation.

As shown above, the portion of that letter which refers to timeclocks does not actually illustrate a unilateral change in working conditions. What the letter indicates is that Respondent is moving forward with the purchase of timeclocks and that the date of the purchase of the timeclocks is unknown.

I am not convinced that illustrates a unilateral change in working conditions. In fact if the letter had included a date certain for the purchase of timeclocks it is doubtful that would constitute an unilateral change absent some showing of action in installing and putting into effect the timeclocks. Nothing is said in the letter regarding either installation or effective date of the implementation of a timeclock system. Therefore, I agree with Respondent and grant the motion to dismiss this allegation.

Eliminated Perfect Attendance Bonus

The September 13 letter from Respondent's attorney included:

> The perfect attendance bonus day off is eliminated effective immediately.

Julian Gignilliat admitted that Respondent did eliminate the perfect attendance bonus. After the Union brought the perfect attendance policy to Respondent's attention, Respondent researched the question and discovered the bonus had never been paid. However, at that point Respondent paid those employees that had qualified with perfect attendance. It was that short-lived practice that Respondent eliminated on September 13, 1990.

Findings

As discussed above, I find that Respondent engaged in illegal activity by declaring an impasse on September 13, 1990. An employer may not legally implement unilateral changes in working conditions without negotiating to contract or impasse, regarding those changes. Here, that did not occur.

Despite the fact that Respondent's practice was short-lived, the record does show that was an established practice and the change does support the finding of a violation.

Changed Sick Leave Payment Policy

As above, the following was included in Respondent's attorney's September 13 letter:

> Effective October 1, we will begin paying sick leave on the second and subsequent consecutive days of each absence because of sickness and we may require a physician's statement before making sick leave payments.

Julian Gignilliat testified that the change in sick leave payment was never implemented.

Findings

As discussed above, I find that Respondent engaged in illegal activity by declaring an impasse on September 13, 1990. An employer may not legally implement unilateral changes in working conditions without negotiating to contract or impasse, regarding those changes. Here, that did not occur.

Despite the fact that the record through the testimony of Julian Gignilliat which I credit, shows that this change was not actually implemented, Respondent announced to its employees that it was being implemented. That announcement constitutes a change in policy which must be remedied. I find that Respondent engaged in an illegal unilateral change in policy by announcing a change in its sick payment practice.

Changed Full-Time Status, Sick Leave, and Vacation Benefits for Certain Employees

The September 13 letter from Respondent's attorney included:

> Effective October 1, 1990, employees must regularly work five days (37 1/2 hours) per week or ten days/75 hours biweekly to be eligible for full time status and full time employee benefits. The immediate significance of this change is that Bethea will no longer pay for health insurance coverage of a small number (a half dozen or less) of employees who presently work only 4 days a week (30 hours). These employees will still have whatever remains of their sick leave and vacation from its accrual January 1, 1990, but will not earn additional sick leave and vacation on January 1, 1991. Nor will they be eligible for holidays after October 1, 1990. If these employees wish, we will attempt to maintain their full time status by offering them an additional day of work each week, although not necessarily on the same shift or in the exact same job.

Julian Gignilliat testified that the change in full-time status, sick leave, and vacation benefits was never implemented.

Findings

As discussed above, I find that Respondent declared an impasse prematurely September 13, 1990.

Despite the fact that the record through the testimony of Julian Gignilliat, which I credit, shows that this change was not actually implemented, Respondent announced to its employees that it was being implemented. That announcement constitutes a change in policy which must be remedied. I find that Respondent engaged in an illegal unilateral change in policy by announcing a change in its sick payment practice.

Announced Future Implementation of Revised but Unspecified Work Rules

The September 13 letter from Respondent's attorney included:

> We are investigating the purchase of video cameras, etc., but will notify you before they are installed, assuming that a decision is made to install them.
>
> We are in the process of revision work rules, but will send you a copy before they are announced to the employees.

Julian Gignilliat testified that Respondent never has written up revised work rules despite his comments in the September 13 letter.

Findings

I see nothing here which constitutes an actual change in working conditions or a notice of change. Therefore, I find that the record does not support a finding of a violation in this instance.

Changed Health Insurance Coverage

As shown above, Respondent's attorney included the following in his September 13 letter:

> Effective October 1, 1990, employees must regularly work five days (37 1/2 hours) per week or ten days/75 hours biweekly to be eligible for full time status and full time employee benefits. The immediate significance of this change is that Bethea will no longer pay for health insurance coverage of a small number (a half dozen or less) of employees who presently work only 4 days a week (30 hours). These employees will still have whatever remains of their sick leave and vacation from its accrual January 1, 1990, but will not earn additional sick leave and vacation on January 1, 1991. Nor will they be eligible for holidays after October 1, 1990. If these employees wish, we will attempt to maintain their full time status by offering them an additional day of work each week, although not necessarily on the same shift or in the exact same job.

Julian Gignilliat testified that there was no actual change made in health care coverage despite the above comments in his letter.

Findings

Despite the fact that the record shows that this change was not actually implemented, Respondent announced to its employees by notice to the Union, that it was being implemented. That announcement constitutes a change in policy which must be remedied. I find that Respondent engaged in a illegal unilateral change in policy.

Implemented Merit Wage Increase on October 29, 1990

As shown above, on October 29 Respondent's new administrator, Ronald Hendrix, posted a memo to employees. That memo included the following paragraph:

> In order to reduce conflict, I have recommended to the Board of Trustees, and the Board has agreed, that one of the several lawsuits involving our employees be settled. This means that we will put into effect a new pay plan which combines the principles of guaranteed rates of pay based upon length of service and qualifications with the opportunity to earn higher rates of pay based on merit. Since I am new here, I have decided that all employees who were employed on January 1, 1990, and have not received a wage increase of three percent since December 15, 1989, merit an increase of at least three percent or of whatever amount is necessary to bring their total 1990 increases up to a three percent raise over their December 15, 1989 rates. These increases will go into effect October 29, 1990.

Respondent Attorney Gignilliat testified that Respondent did implement a pay increase that amounted to what the employees would have received had they received a 3-percent increase on January 4, 1990. That included implementing the pay plan proposed to the Union which included minimums according to job classifications and length of service and, as a result, some employees received pay increases in excess of 3 percent.

The Union complained, according to Gignilliat, that some employees were not properly increased in pay in accord with their pay classification or length of service, and, in those instances, the matters were corrected.

Findings

As discussed above, I find that Respondent engaged in illegal activity by declaring an impasse on September 13, 1990. An employer may not legally implement unilateral changes in working conditions without negotiating to contract or impasse, regarding those changes. Here, that did not occur.

Required Nurses Assistants to Work all Three Shifts in Order to Qualify as Full-Time Employee on or About December 18, 1990

As shown above, Eileen Hanson testified that Respondent gave the Union copies of some postings for jobs during the December 18 negotiating session. One of those postings was for nurses assistants and that posting indicated that in order to qualify for full-time status the applicant must work all three shifts. Hanson testified that was the first time the Union was advised of that was Respondent's policy at that time.

Director of Nurses Matthews had posted a notice of full-time vacancies for nurses assistants on November 21, 1990:

> Two (2) additional full time Nursing Assistant positions will be filled January 1, 1991. These positions will require that the Nursing Assistant work all three shifts as assigned. Interested Nursing Assistants should apply in writing to me by November 28, 1990.
>
> The employees who are given full time status must work their scheduled hours beginning immediately. If the scheduled hours are not worked, the employee will be returned to part time status and will lose full time benefits and someone else will be changed to full time status.

Matthews admitted that she was unaware of any prior instance where it had posted those requirements for full-time nurses assistants positions.

Findings

Unlike the situation regarding other unilateral changes, there was no evidence that Respondent brought this matter to the Union's attention until after the change had been implemented. As shown above, the Union was given the job posting on December 18, 1990, after it had been posted for the employees on November 21, 1990.

Therefore, regardless of the issue of impasse, the evidence supports the finding of a violation as to this issue. The record, including evidence mentioned above regarding Patricia Harrison, illustrated that Respondent had changed its policy as to new hires and, according to Director of Nursing McIntyre, to others on a descending seniority scale, regarding assignments. Nurses were frequently assigned shifts other than what they considered their regular shift. However, there was no showing of specific requirements for hire, or restoration of full-time status, until the above posting.

I find that Respondent engaged in an 8(a)(5) violation by unilaterally changing its requirements for an employee to be employed as a full-time nursing assistant.

Refused to Meet and Bargain Since May 3, 1991

As shown above on May 3, Respondent wrote the Union:

> This is in response to your letter dated May 1, 1991. At the close of our last bargaining session on February 14 of this year, I understood Ed Davis to have made a proposal from the union which substantially narrowed the issues which separated us. A few days later, I wrote Ed a letter which represented the final *offer* which Bethea would make but in which I indicated to him that if the union made a counterproposal along certain specified lines, I would advise my client's board of trustees to make a change in its position which would achieve a contract. Several weeks later, Ed asked me to meet him and union president Muncus for lunch to discuss a contract. Our meeting was congenial, but Mr. Muncus returned to a position which was further away than the last position which Ed Davis had taken.
>
> You have our final offer. We are at an impasse and further meetings will accomplish nothing. For that reason, Bethea declines to negotiate further unless and until the union agrees to the terms set forth in my last letter to Ed Davis.
>
> Bethea's position regarding further negotiations is not a withdrawal of recognition.

Respondent argues that it was correct, the parties were at impasse, and further bargaining was futile. It cited *NLRB v. Big Three Industries*, 497 F.2d 43 at 48 (9th Cir. 1974); *NLRB v. Tomco Communications*, 567 F.2d 871 at 881 (9th Cir. 1978); *L. W. LeFort Co*., 290 NLRB 344 (1988).

Findings

As discussed above, I find that Respondent has engaged in bad-faith bargaining and illegal unilateral changes in working conditions. In view of those findings, I also find that Respondent's refusal to continue to meet and negotiate with the Union, constitutes an additional violation of Section 8(a)(1) and (5) of the Act.

Since May 1, 1990, Refused to Provide the Union Access

Union Business Agent Eileen Hanson testified that Respondent has continually denied the Union access to the home even though the Union requested access for the purpose of investigating an incident which led to a grievance.

The Union grieved over the discharge of Mildred Bruce. Respondent accused Bruce with stealing milk and cake. Hanson spoke to Administrator Horace Hawes about the grievance on May 1, 1990. Hawes told Hanson that the allegedly stolen items were found in Bruce's locker in Respondent's dietary locker room. Hanson asked Hawes if she could go down to the dietary and look at the area in investigating the grievance. Hawes told Hanson that he could not do that at that time but that he would get in touch with her.

At that time the Union did not have a steward present in the dietary area and other stewards were not permitted in that area of Respondent's facility.

Subsequently Hanson renewed her request for access to the locker area during a phone conversation with Respondent's attorney. The attorney told Hanson that he would do everything legally possible to keep her from viewing the locker area. Respondent has continued to deny the Union access to the locker area despite the fact that the Union has written Respondent renewing its request.

According to Hanson, she told Respondent that she needed to view the locker area to investigate the possibility that the allegedly stolen items had been planted in Mildred Bruce's locker. It was Hanson's understanding that the lockers were left unlocked. Hanson also needed to check where the food items were normally stored.

Respondent took the position that it recognized there was a possibility that the food could have been planted in Bruce's locker.

In that regard, Respondent cited a paragraph of its letter to the Union denying the Union access:

> The only reason (Administrator) Hawes called Ms. Bruce to his office (with Carol Bishop as union representative) to discuss the matter was because of the possibility that the goods had been planted in that locker. In other words, Ms. Bruce was interviewed by Mr. Hawes because the goods were in her locker. She was discharged because her statements, omissions, and actions during that interview convinced Mr. Hawes that she had, in fact, put the goods in that locker.

Therefore, Respondent argued that Union access was irrelevant to the grievance. Despite Respondent's argument that it recognized the possibility of a plant, it decided to terminate Bruce on the grounds she had stolen food.

Respondent also pointed out in its letter to the Union that one of the Union's committee members worked in the dietary department and was familiar with the area. It developed that Respondent was in error as to that point. That person was off work due to a disability.

Respondent nevertheless, in its brief, argued that the committee member could have supplied information regarding the dietary department from her home.

Findings

General Counsel cited *National Broadcasting Co*., 276 NLRB 118 (1985); *Holyoke Water Power Co*., 273 NLRB 1369 (1985), in arguing that the Union was entitled to access and view the dietary area pursuant to their request.

The Board held in *Holyoke Water Power Co*., 273 NLRB 1369 (1985), that in cases involving a union's request for access to an employer's premises for informational purposes, it will apply a balancing test, derived from *NLRB v. Babcock & Wilcox Co*., which seeks to accommodate both the employer's common law right to control its property and the employees' statutory right to proper representation by their union. In *Holyoke*, the Board stated that this balancing test applies as follows:

> Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternative means other than by entering on the employer's premises, the employer's property rights will predominate, and the union must properly be denied access. *National Broadcasting Co*., 276 NLRB 118 (1985).

I am convinced that responsible representation of the employees can be achieved only by the Union having access in this case. Although Respondent contended that it recognized the possiblily of a plant in Bruce's locker, it did not accept that a plant actually occurred. Indeed Respondent decided, on the basis of the administrator's interview with Bruce, that no plant had occurred.

Perhaps the administrator was correct. However, the Union, by being denied the right to view the area and consider for itself the opportunities for a plant, was left in a position of being handicapped in arguing the point.

Moreover, it is apparent that no alternative approach to this matter would have given the Union full opportunity to investigate the incident.

Therefore, I agree with General Counsel and find that Respondent engaged in conduct violative of the Act by denying the Union access.

Respondent may not, by simply announcing that it understands there is a possibility that food was planted in Bruce's locker, foreclose the possibility that the Union may be able to support that possibility with evidence gained by viewing the premises.

From May 1, 1991, to June 17, 1991, Refused to Supply the Union with Requested Information Which was Relevant

On May 1, the Union wrote Respondent asking for a meeting on May 15 and for a list of new hires and relevant information regarding those hires. Eileen Hanson testified that the Union did not receive that information on new hires until the middle of June after they made a second request.

Julian Gignilliat admitted there was a delay in supplying information to the Union after the Union made a request. Gignilliat relayed the request to the home and, apparently, the administrator simply forgot the request.

General Counsel cited *Timkin Roller Bearing*, 138 NLRB 15 (1962), enfd. 325 F.2d 746 (19); *DePalma Printing Co*., 204 NLRB 31, 33 (1973); *Pennco, Inc*., 212 NLRB 677 (1974); *Safeway Stores*, 252 NLRB 682 (1980), in arguing that Respondent engaged in illegal activity by delaying production of the requested information.

Findings

Perhaps, as Respondent argues, this is a technical allegation. However, despite the possibility that Respondent may be innocent of any actual intent and may have, in fact, simply temporarily overlooked the Union's request, the Union is entitled to compliance with its request for relevant information in a timely manner. Here, that did not occur. I find that Respondent violated Section 8(a)(1) and (5) by failing to supply the requested information in a timely fashion.

CONCLUSIONS OF LAW

1. Bethea Baptist Home, a Division of South Carolina Baptist Ministries for the Aging, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union Local 204, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent by threatening its employees with loss of benefits; by threatening its employees with loss of jobs; by threatening its employees with more strict enforcement of work rules; by coercively interrogating its employees; and by threatening its employees with unspecified reprisals because of the activities on behalf of United Food and Commercial Workers Union Local 204, AFL–CIO, a labor organization, Respondent has engaged in conduct in violation of Section 8(a)(1) of the Act.

4. Respondent, by issuing disciplinary warnings to its employee Carol Bishop on two occasions; by changing the nature of Carol Bishop's work duties on three occasions; by refusing to accord its employee Patricia Harrison full-time status; by suspending and discharging its employee Robert Dargan; and by changing the requirements for employees to qualify as full-time employees by working more than one shift; because of its employees' activities on behalf of United Food and Commercial Workers Union Local 204, AFL–CIO, has violated Section 8(a)(1) and (3) of the Act.

5. United Food and Commercial Workers Union Local 204, AFL–CIO has been at times material, the exclusive representative for the purposes of collective bargaining of the following employees:

> All service and maintenance employees, including all regularly scheduled non-professional employees, including nursing assistants, orderlies, couriers, activities assistants, dietary employees, housekeeping and laundry employees, ward secretaries and groundsmen employed by the Respondent at its Darlington, South Carolina facility located at 3500 S. Main Street but excluding all office clerical employees, registered nurses, licensed practical nurses, professional and technical employees, painters, independent contractors, department heads, temporary, casual and on-call employees, guards and supervisors as defined in the Act.

6. By bargaining with United Food and Commercial Workers Union Local 204, AFL–CIO with no intention of reaching agreement, Respondent has violated Section 8(a)(1) and (5) of the Act.

7. By unilaterally implementing changes in working conditions of employees in the above-described bargaining unit by failing and refusing to grant bargaining unit employees pay increases in accord with established practice on January 1990 and on January 1991; by changing its employees pay periods; by eliminating its perfect attendance bonus; by changing its sick leave payment practice; by changing full-time status as to the number of hours of work required, sick leave, and vacation benefits; by announcing future implementation of revised work rules; by changing health insurance coverage on September 13, 1990; by implementing a merit wage increase on October 29, 1990; by changing its requirements as to the number of shifts its employees must work in order to qualify as full-time employees during December 1990; without bargaining to an agreement, or to impasse, with United Food and Commercial Workers Union, Respondent has violated Section 8(a)(1) and (5) of the Act.

8. By failing and refusing to furnish United Food and Commercial Workers Union Local 204, AFL–CIO requested information in a timely manner, which information was necessary for the United Food and Commercial Workers Union to fulfill its bargaining responsibilities, and by refusing the provide the Union access to its facility in order to fully investigate a matter which resulted in disciplinary action against a bargaining unit employee, Respondent violated Section 8(a)(1) and (5) of the Act.

9. By failing and refusing to bargain with United Food and Commercial Workers Union Local 204, AFL–CIO as exclusive collective-bargaining representative of the above-described bargaining unit of employees, Respondent has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

10. Respondent by refusing to meet and negotiate with the above-mentioned Union, pursuant to the Union's request, since May 3, 1991, has engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally suspended and discharged its employee Robert Dargan and has illegally refused to accord full-time employee status to its employee Patricia Harrison in violation of sections of the Act, I shall order Respondent to offer Dargan immediate and full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, and to immediately place Harrison in a full-time nurses assistant position, without prejudice to their seniority or other rights and privileges. I further order Respondent to make Dargan and Harrison whole for any loss of earnings and loss caused by loss of benefits, they suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful actions against its employees Dargan, Harrison, and Carol Bishop and notify Dargan, Harrison, and Bishop in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As I have found that Respondent engaged in illegal activity by unlawfully bargaining in bad faith with United Food and Commercial Workers Union Local 204, AFL–CIO with no intention of reaching a collective-bargaining agreement, by unilaterally implementing changes in working conditions when it had not bargained to impasse; by denying the Union access to its facility for the purpose of investigating an incident which led to disciplinary action against a bargaining unit employee, and by refusing to supply United Food and Commercial Workers Union with relevant information necessary to United Food and Commercial Workers Union's

bargaining responsibilities in a timely fashion, I shall recommend that Respondent be ordered to restore terms and conditions of work for bargaining unit employees to the status quo of August 11, 1989, and that it grant increased wages which were illegally withheld from bargaining unit employees in 1990 and 1991; that on request, it permit the Union access to its facility for the purpose of investigating disciplinary action taken against a bargaining unit employee; that it supply United Food and Commercial Workers Union with information relevant to United Food and Commercial Workers Union's bargaining responsibility; and on request, bargain in good faith with United Food and Commercial Workers Union. It appears that the remedy may include make-whole requirements resulting from Respondent's illegal implementation of its final order. *Storer Communications*, 294 NLRB 1056 (1989). If necessary, the extent of Respondent's make-whole obligation should be set through compliance proceedings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Bethea Baptist Home, a Division of South Carolina Baptist Ministries for the Aging, Inc., Darlington, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in conduct in violation of Section 8(a)(1) of the Act by threatening its employees with loss of benefits; loss of jobs and more strict enforcement of work rules; by coercively interrogating its employees about their union activities; and by threatening its employees with unspecified reprisals because of its employees' union activities.

(b) Discharging, suspending, refusing to accord employees full-time status, and issuing warnings to its employees because of their protected activities.

(c) Refusing to bargain with United Food and Commercial Workers Union Local 204, AFL–CIO as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining within the meaning of Section (b) of the Act.

> All service and maintenance employees, including all regularly scheduled non-professional employees, including nursing assistants, orderlies, couriers, activities assistants, dietary employees, housekeeping and laundry employees, ward secretaries and groundsmen employed by the Respondent at its Darlington, South Carolina facility located at 3500 S. Main Street but excluding all office clerical employees, registered nurses, licensed practical nurses, professional and technical employees, painters, independent contractors, department heads, temporary, casual and on-call employees, guards and supervisors as defined in the Act.

(d) Unilaterally implementing terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse.

(e) Refusing to provide access to its facilities and refusing to timely furnish United Food and Commercial Workers Union Local 204, AFL–CIO with information requested, which is necessary for United Food and Commercial Workers Union Local 204, AFL–CIO to perform its function as a representative of employees in the above-described bargaining unit.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Dargan immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and immediately restore Patricia Harrison to a full-time position as nurses assistant, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Dargan and Harrison whole for any loss of earnings or loss caused by Harrison being illegally deprived of benefits, plus interest, they suffered by reason of its illegal actions.

(b) Rescind its discharge, suspension, refusal to accord full-time status, and illegal warnings issued to Robert Dargan, Patricia Harrison, and Carol Bishop and remove from its files any reference to its illegal actions and notify each of those employees in writing that this has been done and that evidence of its unlawful actions will not be used against them in any way.

(c) On request, meet and bargain with United Food and Commercial Workers Union Local 204, AFL–CIO, as the duly designated representative of its employees in the above-described appropriate unit.

(d) On request by United Food and Commercial Workers Union Local 204, AFL–CIO revoke the unilateral changes in the rates of pay, wages, and other terms and conditions of employment that were placed into effect among employees in the appropriate bargaining unit, until such time as the Respondent negotiates with United Food and Commercial Workers Union Local 204, AFL–CIO in good faith or an impasse in negotiations is reached.

(e) Furnish United Food and Commercial Workers Union Local 204, AFL–CIO with the information requested and provide the Union access to its facility, which is necessary for United Food and Commercial Workers Union Local 204, AFL–CIO to perform its function as a representative of employees in the above-described bargaining unit.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Darlington, South Carolina, copies of the attached notice marked ''Appendix.''[3] Copies of the

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.